Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM 1997

NATIONSBANK OF GEORGIA, N.A., AND SOVRAN CAPITAL MANAGEMENT CORPORATION,

Petitioners,

v.

ALEXIS M. HERMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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MAY 22, 1998

The present matter concerns the actions of a trustee for an ERISA-governed Employee Stock Ownership Plan in response to competing tender offers for the company stock held therein.

Questions Presented

1. Is notification of potential liability a prerequisite to being a "named fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA")?

2. Does a "directed fiduciary" retain a duty to determine whether the directions of a named fiduciary are prudent under § 404(a) of ERISA?

3. What is the appropriate standard of review for the determinations of a discretionary fiduciary when following plan provisions designed to effectuate the intent of Congress?

4. Is an informal interpretation of an administrative agency, with regard to which discovery was limited by way of the "deliberative process privilege," entitled to deference by the courts of the United States?

List of Parent Companies and Subsidiaries

Parties:

NationsBank of Georgia, N.A.
Sovran Capital Management Corporation
Alexis M. Herman, Secretary of the United States Department of Labor

Parent Companies and Wholly Owned Subsidiaries:

NationsBank of Georgia, N.A. (presently known as NationsBank, N.A.) and Sovran Capital Management Corporation are both wholly owned subsidiaries of NB Holdings Corporation, which is in turn a wholly owned subsidiary of NationsBank Corporation. A listing of all companies which are wholly owned subsidiaries of NationsBank, N.A. is found at Appendix E (App., *infra*, 48a).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

STATEMENT OF PARTIES, PARENT COMPANIES AND SUBSIDIARIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Statement of Facts 2

B. Proceedings Below 5

C. Contentions at Issues 6

REASONS FOR GRANTING THE WRIT 7

I. The Court of Appeals' Interpretation of 29 U.S.C. § 1102(a)(2) Conflicts with the Clear Language of the Statute and Erroneously Decides an Important Issue of Federal Statutory Law. 7

II. The Court of Appeals' Interpretation of the Directed Trustee Standard Under 29 U.S.C. § 1103(a)(1) Conflicts with that of Multiple

Sister Circuits and Creates a Split of Authority Within the Circuit Courts. 10

III. The Court of Appeals' Interpretation of the Standard of Review for the Actions of a Discretionary Fiduciary When Following the Intent of Congress Directly Conflicts with that of the Sixth and Third Circuits. 11

IV. The Court of Appeals' Deferral to the Informal Interpretations of the Secretary as Represented in the Polaroid Letter Creates Dangerous Precedent and Represents An Erroneous Extension of the *Chevron* Doctrine. 14

CONCLUSION 17

APPENDIX A
Opinion of the Court of Appeals Denying Rehearing (Feb. 25, 1998) 1a

APPENDIX B
Original Opinion of the Court of Appeals (Nov. 5, 1997) 4a

APPENDIX C
Order of the District Court Certifying for Interlocutory Appeal (May 10, 1995) 34a

APPENDIX D
Order of the District Court (March 29, 1995) 37a

APPENDIX E
Wholly Owned Subsidiaries of NationsBank, N.A. 48a

TABLE OF AUTHORITIES

CASES

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15
Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) 12
FirsTier Bank, N.A. v. Zeller, 16 F.3d 907 (8th Cir.), *cert. denied*, 513 U.S. 871 (1994) 11
Grindstaff v. Green, 133 F.3d 416 (6th Cir. 1998) 11
Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995) 11, 12, 13, 14
Maniace v. Commerce Bank of Kansas City, N.A.., 40 F.3d 264 (8th Cir. 1994), *cert. denied*, 514 U.S. 1111 (1995) 10
Martin v. Feilen, 965 F.2d 660, 664 (8th Cir. 1992), *cert. denied*, (1993) 506 U.S. 1054 12
Martin v. Valley National Bank of Arizona, 140 F.R.D. 291 (S.D.N.Y. 1991) 16
Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 9
Mertens v. Hewitt Assocs., 508 U.S. 248 1 (1993) 9
Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996) 11, 12, 13, 14
Nadler v. United States Department of Justice, 955 F.2d 1479 (11th Cir. 1992) 16
Silverman v. Mutual Benefit Life Ins. Co., 138 F.3d 98 (2d Cir. 1998) 11

STATUTES AND REGULATIONS

26 U.S.C. § 409(e)(2) 12
26 U.S.C. § 409(e)(3) 12
28 U.S.C. § 1254(l) 2
28 U.S.C. § 1292(b) 2, 6

29 U.S.C. § 1002(21)(A) -- ERISA § 3(21)(A) 2, 8, 17
29 U.S.C. § 1102(a) -- ERISA § 402(a) 7, 9
29 U.S.C. § 1102(a)(2) -- ERISA § 402(a)(2) 2, 7, 17
29 U.S.C. § 1103(a) -- ERISA § 403(a) 6, 11, 17
29 U.S.C. § 1103(a)(1) -- ERISA § 403(a)(1) 2, 10, 13
29 U.S.C. § 1104(a) -- ERISA § 404(a) 2, 6
29 U.S.C. § 1104(a)(1) -- ERISA § 404(a)(1) 10, 13, 14
29 U.S.C. § 1104(a)(1)(B) -- ERISA § 404(a)(1)(B) 13
29 U.S.C. § 1104(a)(1)(D) -- ERISA § 404(a)(1)(D) 13
29 U.S.C. § 1105(a)(2) -- ERISA § 405(a)(2) 9
29 C.F.R. § 2509.75-5 9

LEGISLATIVE HISTORY AND OTHER SOURCES

129 Cong. Rec. S16629 (daily ed. Nov. 7, 1983)
(Statement of Sen. Long) 12

Tax Reform Act of 1976, Pub.L. No. 94-455, §803(h),
90 Stat. 1590 12

DOL ERISA Procedure 76-1 15

DOL Information Letter to Citizens & Southern Trust Company
(February 23, 1989), *reprinted in*
16 BNA Pen. Rptr. 390 (March 6, 1989)(the "Polaroid
Letter") 4

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NATIONSBANK OF GEORGIA, N.A., AND SOVRAN CAPITAL MANAGEMENT CORPORATION,
Petitioners,

V.

ALEXIS M. HERMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NationsBank of Georgia, N.A. and Sovran Capital Management Corporation (the "Trustee"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals denying rehearing (App., *infra*, 1a - 3a) is reported at 135 F.3d 1409 (11th Cir.

1998). The original opinion of the Court of Appeals (App., *infra*, 4a - 33a) is reported at 126 F.3d 1354 (11th Cir. 1997). The opinion of the district court amending its previous opinion to certify the question pursuant to 28 U.S.C. § 1292(b) (App., *infra*, 34a - 36a) is unreported. The original opinion of the district court (App., *infra*, 37a - 47a) is unreported but may be found at 1995 U.S. Dist. LEXIS 5328 (N.D. Ga. March 29, 1995).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals denied rehearing on February 25, 1998.

STATUTORY PROVISIONS INVOLVED

Sections 3(21)(A), 402(a)(2), 403(a)(1) and 404(a) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.*; 29 U.S.C. § 1002(21)(A), 29 U.S.C. § 1102(a)(2), 29 U.S.C. § 1103(a)(1), 29 U.S.C. § 1104(a).

STATEMENT OF THE CASE

A. Statement of Facts

On July 12, 1988, the Board of Directors of Polaroid Corporation ("Polaroid") adopted the Polaroid Stock Equity Plan (the "ESOP"). At the time of its formation, the ESOP purchased approximately 13.4% of Polaroid's common stock. The funding of the Polaroid common stock purchase for the ESOP was provided through a cash contribution of approximately $15 million made by Polaroid, together with a loan from Polaroid for approximately $285 million. The ESOP loan was secured by retaining a proportionate amount of the ESOP shares in a suspense account as collateral, to be released as the loan was repaid. Because they were not allocated to individual participants' accounts, the shares owned by the ESOP but held in the suspense account were known as "Unallocated Shares". Those shares purchased with the $15 million cash contribution from Polaroid were allocated to the participant accounts in accordance with the terms of the plan. As each

payment on the loan was made by the ESOP, a portion of the Unallocated Shares was released from the suspense account and allocated to the participants' individual accounts. At the time of the relevant tender offers, over 90% of the ESOP's shares were not allocated to any individual account.

Recognizing the high cost of the ESOP to its employees, Polaroid structured the ESOP to give the employees as much control as possible with regard to tender offers and other similar occurrences. Specifically, the plan document provided that in the event of a tender offer, each participant could direct the trustee to tender or not tender any stock allocated to his or her account. The plan document also prohibited the tender of a participant's shares unless the participant specifically instructed the trustee to tender. This type of arrangement is commonly referred to as an "Instruction Clause" and is contained in the majority of large company ESOPs. Finally, the ESOP provided that the trustee should tender all Unallocated Shares in the same proportions as it tenders Allocated Shares. This type of arrangement is commonly referred to as a "Mirror Clause" and is common in many ESOPs sponsored by large, publicly-traded corporations.

On August 3, 1988, Citizens and Southern Trust Company (Georgia), later known as NationsBank of Georgia, N.A, agreed to become the ESOP Trustee. The Trustee was charged with administering the Polaroid ESOP under the terms of the ESOP's plan document. Citizens and Southern Investment Advisors, later known as Sovran Capital Management Corporation, was retained to provide investment advice to the Trustee of the ESOP.

One week after Polaroid formally created the ESOP, Shamrock Acquisitions III, Inc. commenced what would result in a prolonged, hostile takeover attempt. As a result of this battle for control of Polaroid, two tender offers would eventually be presented to all shareholders including the ESOP -- Shamrock's at $45 per share and Polaroid's "self-tender" at $50 per share (the "Self-Tender").[1] In response to the competing tender offers, the Trustee

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[1] Polaroid's Self-Tender offer extended to $50 per share for a maximum of 16 million shares of its 71.5 million outstanding shares. If

[Footnote Continued On Next Page]

carefully informed participants of the available options: (1) not to tender, (2) to tender to Shamrock, or (3) to tender to Polaroid. The Trustee notified participants that, in accordance with the terms of the plan document, only affirmatively directed shares would be tendered. Specifically, the instructions clearly stated that if a participant did not wish to tender his or her shares, they need not return an instruction form, and such would be treated as an instruction not to tender.

On February 27, 1989, just days after it sent the instruction packets to participants, the Trustee received an unsolicited letter from Alan D. Lebowitz, the Deputy Assistant Secretary for Program Operations at the United States Department of Labor (the "Polaroid Letter").[2] The Polaroid Letter sought to advise the Trustee of the Secretary's opinion regarding the Trustee's duties and responsibilities under ERISA in light of the competing tender offers. Specifically, the Polaroid Letter stated that the Trustee had the "exclusive" responsibility for the decision to tender or not tender the Unallocated Shares as well as those shares for which no participant directions are received (the "Instruction Shares").

On March 20, 1989, the date of the original deadline for responding to the Self-Tender, a committee of the Trustee met to consider its course of action in light of the plan document and participants' instructions. Complicating this determination was the great uncertainty faced with regard to the future value of Polaroid common stock. The Trustee understood that it would be required to reinvest any proceeds achieved in the tender offers in Polaroid common stock at the direction of Polaroid. However, the Trustee did not know when such direction would be given. To the degree that the market price for Polaroid stock was under $50.00 at the time of reinvestment, the ESOP would increase its shares. To the

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[Footnote Continued From Previous Page]

more than 16 million shares were tendered, Polaroid would purchase tendered shares on a pro-rata basis, returning extra shares (or "stub" shares) to each tendering shareholder.

2 *Reprinted in* 16 BNA Pen. Rptr. 390 (March 6, 1989).

degree that the market price was above $50.00, the ESOP stood to lose on the Self-Tender.

Shamrock was thought to be interested in Polaroid to gain control over what could have been a multi-billion dollar patent infringement damages award against Eastman Kodak Company. The trial court had determined that Eastman Kodak Company had infringed upon Polaroid patents, but the size of the damages award remained to be determined, with trial on that issue commencing shortly after the close of the competing tender offers. While the impact of the damages award was of necessity uncertain, some analysts were predicting that the damages award would add materially to the value of each share of Polaroid stock. It was against this uncertain backdrop that the Trustee determined to follow the ESOP provisions. Specifically, the Trustee considered the informal views of the Department of Labor as expressed in the Polaroid Letter and all other relevant factors and decided that the post-tender market price at which the Trustee would be required to re-invest the proceeds of the Self-Tender was sufficiently uncertain that the Trustee should follow the ESOP provisions and tender shares in accordance therewith. Accordingly, and based on participant responses, the Trustee followed the plan document, tendering approximately 5,239,460 shares to the Polaroid Self-Tender. 4,341,970 shares were not tendered to anyone. 1,455,244 ESOP shares were accepted by Polaroid.

Subsequent to Polaroid's Self-Tender, Polaroid reached an agreement with Shamrock which effectively ended Shamrock's hostile takeover bid. With the end of Shamrock's interest, the price of Polaroid stock fell. The Trustee succeeded in re-investing all of the Self-Tender proceeds at prices less than $50 per share, replacing the number of shares required as security in the suspense account, and allocating all additional shares gained through the reinvestment of the Self-Tender proceeds to the then current participants.

B. Proceedings Below

Former Plaintiff Lynn Martin, in her capacity as the Secretary of the United States Department of Labor, filed the

present suit on June 15, 1992, charging each of the Petitioners with violations of ERISA.[3] The Secretary of Labor alleges that as a result of the Polaroid Self-Tender, the ESOP could have acquired more shares if the Trustee had overridden the plan document and the instructions of participants and had instead tendered all unallocated and Instruction Shares to the Self-Tender. The Secretary claims that the Trustee must repay to the ESOP all "damages" (as measured by those extra shares) suffered by the ESOP as a result of the Trustee's failure to disregard the Mirror and Instruction Clauses of the plan document.

After discovery, both parties cross-moved for summary judgment. The district court denied summary judgment with regard to both parties (App., *infra*, 47a), but, upon petition by the Trustee, amended its Order to include the language required under 28 U.S.C. § 1292(b) to permit certification for interlocutory appeal. App., *infra*, 36a. The United States Court of Appeals for the Eleventh Circuit granted permission to appeal. On November 5, 1997, the Court of Appeals issued its opinion affirming in part, reversing in part and remanding this case to the district court for further proceedings. App., *infra*, 4a - 33a. Petitioners filed a timely motion for rehearing which, after seeking the response of the Secretary, was denied by written opinion of February 25, 1998. App., *infra*, 1a - 3a.

C. Contentions at Issue

At issue is whether the Trustee's actions with regard to voting the Unallocated Shares are entitled to review under ERISA § 403(a) as a directed fiduciary or ERISA § 404(a) as a discretionary fiduciary. This determination turns primarily on whether the participants of the ESOP, who are indisputably granted authority under the ESOP to direct the Trustee and who were indisputably

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[3] On January 22, 1993, Robert Reich replaced Lynn Martin as the Secretary of the United States Department of Labor, and succeeded as Plaintiff in the present action. Robert Reich has in turn been replaced as the Secretary of Labor by the present Plaintiff, Alexis Herman.

informed in the summary plan description issued under the ESOP of this authority, constitute "named fiduciaries" as that term is defined under ERISA § 402(a)(2) and, if so, whether the Trustee has any residual obligation other than to follow the facially valid tender instructions of the participants.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Interpretation of 29 U.S.C. § 1102(a)(2) Conflicts with the Clear Language of the Statute and Erroneously Decides an Important Issue of Federal Statutory Law.

In its initial opinion dated November 5, 1997 (the "Opinion"),[4] as modified by its opinion denying rehearing dated February 25, 1998,[5] the United States Court of Appeals for the Eleventh Circuit goes beyond the statutory language of ERISA and establishes an additional and wholly new requirement for one to be a "named fiduciary" pursuant to Section 402(a), 29 U.S.C. § 1102(a) -- liability information.

Section 402(a)(2) of ERISA states that:

> For the purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

29 U.S.C. § 1102(a)(2).

Section 402(a)(2) clearly contemplates that one shall be a "named fiduciary" if one meets two criteria -- i) is designated in the plan document to ii) be a fiduciary, *i.e.*, to occupy a certain role or

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[4] Opinion found at Appendix B to the present Petition, 4a - 33a.

[5] Opinion found at Appendix A to the present Petition, 1a - 3a.

possess certain discretionary functions (whether or not actually exercised) as defined under Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).[6]

However the Court of Appeals has added to the plain language of the statute an inferred additional requirement of affirmative notice of potential liability. Specifically, the Court of Appeals has held in its denial of rehearing that:

> "[t]he participants could not be fiduciaries with regard to the unallocated shares in the absence of explicit notice that they could be held liable for their actions with regard to the unallocated shares. We emphasized that point in our previous opinion when we stated that the possibility of the participants being subjected to liability as fiduciaries for their actions with regard to the unallocated shares was "unacceptable . . . where participants are not adequately informed of the responsibilities they possess and the liability that could go hand in hand with those responsibilities.'"

App., *infra*, 2a - 3a (emphasis added). The Court of Appeals is mistaken in its belief.

The Court of Appeals does not hold that a plan participant (or other person) cannot be a named fiduciary absent affirmative consent. Indeed it expressly notes that it will not hold on this issue. App., *infra*, 3a, 26a, n. 11. Rather, the Court of Appeals appears to indicate that one can designate a participant as a named fiduciary without consent, but only if the named fiduciary is provided notice

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[6] Section 3(21)(A) of ERISA provides, in relevant part:

> "Except as otherwise provided in subparagraph (B) [certain security interests do not create fiduciary relationship], a person is a fiduciary with respect to a plan to the extent . . . (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

29 U.S.C. § 1002(21)(A).

of his or her potential liability. Not only is this interpretation not supported by law in any respect, it is in conflict with the clear language of ERISA and creates a dangerous precedent in an important area of federal law.

This Court has in the past expressed its unwillingness to infer or add to the statute language that Congress did not see fit to include. *See, e.g., Mertens v. Hewitt Assocs. 508 U.S. 248, 261* (1993)("vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text"); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).

The Department of Labor certainly does not believe that affirmative notice of potential liability is a prerequisite to being a named fiduciary and did not argue for such a requirement below. In its regulations, the Department of Labor provides only that "clear identification of one or more persons, by name or title, combined with a statement that such person or persons have authority to control and manage the operation and administration of the plan, satisfied the 'named fiduciary' requirement of section 402(a). The purpose of this requirement is to enable employees and other interested persons to ascertain who is responsible for operating the plan." 29 C.F.R. § 2509.75-5.

The addition by the Court of Appeals of the requirement that named fiduciaries be informed of their potential liability is of vital importance to the ERISA community because of its impact on future cases and its increased burden on plan administration. One can certainly envision the first case in which an individual trustee or other person named under a pension plan as a fiduciary charged with nonfeasance seeks to avoid co-fiduciary liability under ERISA § 405(a)(2) on the basis that regardless of the plan language, and regardless of his or her personal knowledge that he or she is a fiduciary granted authority to act (regardless of whether such authority is actually exercised), he or she is not a validly named fiduciary because he or she never received any official notice that he or she could be personally liable. Petitioners seek the Court's redress of this statutory misinterpretation.

II. The Court of Appeals' Interpretation of the Directed Trustee Standard Under 29 U.S.C. § 1103(a)(1) Conflicts with that of Multiple Sister Circuits and Creates a Split of Authority Within the Circuit Courts.

Even with regard to those shares allocated to individual accounts, where the Court of Appeals has unambiguously stated that participants are named fiduciaries, the Court of Appeals imposes added responsibilities on the Trustee not found in the statute and in contrast to the decisions of other Circuit Courts. While the Court of Appeals recognizes that with regard to allocated shares the Trustee is a directed fiduciary "not governed by § 1104(a)(1), . . . and not required to exercise its independent judgment," the Court of Appeals' opinion nonetheless puts the burden on the Trustees to investigate the nature and reasoning of participants' decisions. App., *infra*, 32a. While the substantial majority of circuits interpreting the duties of the directed trustee under ERISA § 403(a)(1) have determined that, *e.g.*, "[i]mposing any 'residual' duties on [a directed trustee] would, in effect, abrogate the distinction between trustees and directed trustees clearly intended by ERISA",[7] the Court of Appeals in the present matter deviates and would hold a directed trustee to a higher standard -- that of a gatekeeper, rather than a conduit.

Specifically, the Court of Appeals would have a directed trustee be responsible for ensuring that 1) participants have not been subject to undue pressure with regard to their decisions, 2) that all necessary information is given to the participants and 3) that no clearly false or misleading information is distributed to participants. App., *infra*, 32a. These requirements are at odds with the pronouncements of the Eleventh Circuit's sister courts of appeal and should be reviewed by this Court in order to assure consistent duties on named trustees nationwide.

As noted above, the Eighth Circuit in *Maniace v. Commerce Bank of Kansas City, N.A.*, 40 F.3d at 268, found no

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[7] *Maniace v. Commerce Bank of Kansas City, N.A.*, 40 F.3d 264, 268 (8th Cir. 1994), *cert. denied*, 514 U.S. 1111(1995).

residual duties for the directed fiduciary. In *Grindstaff v. Green*, 133 F.3d 416, 425-26 (6th Cir. 1998), the Sixth Circuit determined just this year that a directed trustee had no duty to investigate a named fiduciary's exercise of its discretion. The Second Circuit similarly joins the chorus by noting in *Silverman v. Mutual Benefit Life Ins. Co.*, 138 F.3d 98 (2d Cir. 1998), that a directed trustee's obligations will be measured against the terms of the plan document, the terms of the trust contract entered into with the plan and the terms of the summary plan description, but that the directed trustee shall have no duty of inquiry prior to complying with the instructions of the relevant named fiduciaries.[8]

As noted, the Court of Appeals decision in the instant matter goes contrary to and conflicts with other recent interpretations of the standards to be applied to directed fiduciaries under section 403(a) of ERISA and only serves to aggravate the already confusing universe of law under which the directed fiduciary operates. This Court should undertake the opportunity to determine, once and for all, what duties are required of a directed fiduciary under ERISA § 403(a).

III. The Court of Appeals' Interpretation of the Standard of Review for the Actions of a Discretionary Fiduciary When Following the Intent of Congress Directly Conflicts with that of the Sixth and Third Circuits.

In *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996), and *Kuper v. Iovenko*, 66 F.3d 1447, (6th Cir. 1995), the Third and Sixth Circuits squarely held that where a discretionary fiduciary undertakes to follow the terms

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[8] It should be noted though, that this area of law is far from settled. While the majority of cases hold that there are no residual duties for the directed fiduciary, at least one earlier case, *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 911 (8th Cir.), *cert. denied*, 513 U.S. 871 (1994) held that "an ERISA trustee who deals with plan assets in accordance with proper directions of another fiduciary is not relieved of its fiduciary duties to conform to the prudent man standard of care."

of an ESOP, and where those terms are designed to effectuate particular Congressional intent in the formation of ESOPs, the fiduciary is "entitled to a presumption that it acted consistently with ERISA by virtue of that decision",[9] and thus should be found to have breached his or her fiduciary duties only if his or her actions constitute an "abuse of discretion." *Moench v. Robertson*, 62 F.3d at 571; *Kuper v. Iovenko*, 66 F.3d at 1459.

ESOPs were designed to encourage employee ownership of their employers. *See* 129 Cong. Rec. S16629, S166636 (daily ed., Nov. 7, 1993) (Statement of Sen. Long); *Martin v. Feilen*, 965 F.2d 660, 664 (8th Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993); *Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).[10] Indeed, "[i]n drafting the ESOP provisions of ERISA, Congress intended to encourage employees' ownership of their employer company,"[11] and explicitly warned against any interference with this goal.[12] Whereas both *Moench* and *Kuper* address fiduciary decisions to maintain investments in the stock of the sponsoring corporations, both

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9 *Moench v. Robertson*, 62 F.3d at 571.

10 Congress has consistently expressed the policy goal that ESOPs are designed to give employees an ownership interest in their employers and a voice in the their management. Indeed, § 409(e) of the Internal Revenue Code mandates that participants be entitled to instruct the trustee how to vote shares allocated to their accounts, especially with regard to situations such as mergers, consolidations, liquidations and sales of assets. 26 U.S.C. § 409(e)(2), (3)

11 *Kuper v. Iovenko*, 66 F.3d at 1458.

12 "'The Congress is deeply concerned that the objectives sought by [the series of laws encouraging ESOPs] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.'" *Donovan v. Cunningham*, 716 F.2d at 1466, n. 24 (*quoting* Tax Reform Act of 1976, Pub.L. No. 94-455, §803(h), 90 Stat. 1590).

Courts acknowledge that the arbitrary and capricious standard announced results from "a way for the competing concerns [of ERISA fiduciaries and ESOPs] to coexist." *Moench*, 62 F.3d at 570; *See also Kuper*, 66 F.3d at 1548 (quoting *Moench*).

The Court of Appeals in the present matter failed to take into account the special considerations for ESOPs intended by Congress. When considering whether participants should be permitted to effectively control the shares of stock that they bought through reductions in wages and other concessions, the Court of Appeals treated the Polaroid ESOP as a conventional retirement plan, specifically in contrast to the cited Congressional admonitions. Specifically, the panel decision held:

> "Since Polaroid ESOP participants are not named fiduciaries with regard to unallocated shares, 29 U.S.C. § 1103(a)(1) and its directed trustee standard do not govern NationsBank's conduct with regard to the tendering of those shares. Instead, NationsBank retained the exclusive fiduciary authority to manage those shares, and its conduct with regard to those shares is governed by the fiduciary standards in 29 U.S.C. § 1104(a)(1). According to § 1104(a)(1)(D), NationsBank was obligated to determine whether the plan provisions regarding the voting of unallocated shares were contrary to ERISA. *See id.* NationsBank also was required to determine whether it was prudent to tender the unallocated shares, and if so, to whom, *see* 29 U.S.C. § 1104(a)(1)(B), and it had the duty to act solely in the interest of the plan participants, *see id.* § 1104(a)(1)."

App., *infra*, 27a - 28a.

As is apparent, the above quoted determination directly contrasts with *Moench* and *Kuper*, and creates a split in the Circuits. The Third and Sixth Circuits have held that the proper standard of review with regard to the actions of a discretionary fiduciary attempting to implement the expressed desires of Congress is the "arbitrary and capricious" standard. The Eleventh

Circuit, in the present matter, has expressly rejected the arbitrary and capricious standard, noting that:

> "NationsBank argues that an ERISA trustee must follow a plan provision unless . . . following the provision would be an abuse of the trustee's discretion. We disagree, at least where plan participants are not sufficiently informed to be named fiduciaries. In such a situation, ERISA dictates that a mirror voting provision that leads to an imprudent result is invalid as applied. Therefore, the trustee must disregard the provision, just like it would have to disregard any other plan provision controlling the disposition of plan assets which leads to an imprudent result. *See* 29 U.S.C. § 1104(a)(1) (providing that a fiduciary must act in the manner a prudent man would act in managing plan assets)."

App., *infra*, 29a. As is evident, the panel opinion dictates that in the Eleventh Circuit, the "prudent person" standard is to be applied where an ESOP fiduciary is following provisions designed to comport with Congressional intent -- a result that the Third and Sixth Circuits expressly rejected. *See*, *Moench*, 62 F.3d at 562-63; *Kuper*, 66 F.3d at 1459.

IV. The Court of Appeals' Deferral to the Informal Interpretations of the Secretary as Represented in the Polaroid Letter Creates Dangerous Precedent and Represents An Erroneous Extension of the *Chevron* Doctrine.

In its panel opinion, the Court of Appeals holds that it has an obligation to grant deference to the views of the Secretary of Labor as those views are expressed in the Polaroid Letter. App., infra, 17a - 20a. In doing so, the Court of Appeals misapprehends the important distinction between two different levels of communications utilized by the Department of Labor -- the Advisory Opinion and the Information Letter -- and in effect allows

the Secretary to take a position that cannot be relied upon by any private person, but to which the Secretary can cite as the weight of law.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) and its progeny properly grant deference to official interpretations of statutory schemes with which an executive agency has been entrusted to administer. However, the Court of Appeals extension of the *Chevron* doctrine to the present matter impermissibly stretches the limits of that doctrine and creates dangerous precedence by giving legal sanction to informal positions. The Court of Appeals, discussing *Chevron*, held that "[a]lthough the Secretary has not promulgated regulations on the issues presented in this appeal, we still owe her pre-litigation opinion letter views considerable deference." App., *infra*, 18a.

The Court of Appeals' incorrect *Chevron* analysis stems from its fundamental misunderstanding of the distinction between a Department of Labor Advisory Opinion letter and a Department of Labor Information Letter. ERISA Procedure 76-1 provides the relevant guidance with regard to the content and effect of Advisory Opinions and Information Letters. Whereas an Advisory Opinion represents the considered views of the Department of Labor, is given official citation,[13] and is generally made available to the public,[14] an Information Letter does not pass through the same level of internal scrutiny, is not officially designated (hence the common monikers often applied by practitioners, *e.g.*, "the Polaroid Letter"), and is not publicly available through official sources. For these reasons, the Department of Labor itself states in Section 11 of ERISA Procedure 76-1 (Effect of Information Letters), "[a]n information letter issued by the Department is informational only and is not binding on the Department with respect to any particular factual situation." Quite simply, an

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[13] Advisory Opinion letters are officially numbered for ease of reference (*e.g.*, Advisory Opinion 94-03A).

[14] Advisory Opinion letters are open to public inspection at the offices of the Department of Labor. *See*, ERISA Procedure 76-1, § 12.01.

Information Letter does not represent the formal position of the Department of Labor, cannot be relied upon, even by the recipient thereof, and should not be accorded *Chevron* deference

Moreover, the views of the Secretary are even less worthy of deference in the immediate action because of the Secretary's invocation of the "deliberative process privilege" during discovery. The purpose of the deliberative process privilege is to protect the internal decision making processes of the executive branch in order to safeguard the quality of agency decisions. *See*, *Nadler v. United States Department of Justice*, 955 F.2d 1479, 1490-91 (11th Cir. 1992); *see also*, *Martin v. Valley National Bank of Arizona*, 140 F.R.D. 291 (S.D.N.Y. 1991). However, where an agency plans to assert that a court should defer to its interpretation of a statute, this privilege does not preclude discovery of internal deliberations leading to the agency's expressed viewpoint. *See*, *Valley National*, 140 F.R.D. at 312. Such discovery is necessary so that those in opposition to the Secretary may be given the opportunity to explore the bona fides of the Secretary's interpretation as illumined by the internal deliberations leading to that expressed viewpoint. Id. During the discovery phase of this action, the Secretary successfully asserted the deliberative process privilege, and, thus, the internal communications leading to his interpretation of ERISA were not disclosed. The Court of Appeals' opinion gives deference to the Secretary's views even though the Petitioners have not been given the opportunity to explore the *bona fides* of the Secretary's interpretation.

The Court of Appeals misinterprets both aspects of this argument and creates dangerous precedent in doing so. The Court of Appeals opinion grants deference to informal agency positions as well as agency positions where defendants' discovery rights have been effectively negated by invocation of the deliberative process privilege. The panel opinion thus effectively grants the agencies of the United States the ability to create law by fiat and in secret. Petitioners respectfully request the Court to review this extraordinary grant of power to the administrative agencies of the United States.

CONCLUSION

The panel opinion, as modified by the opinion denying rehearing, adds the requirement that one must be apprised of potential liability in order to be considered a named fiduciary under sections 3(21)(A) and 402(a)(2) of ERISA. This is clearly incorrect, contrary to the plain language of the statute, and risks important consequences. The panel opinion adds certain gatekeeper requirements to the directed trustee standard established under section 403(a) of ERISA, creating a conflict among the circuits. Further, the panel opinion conflicts with other circuit opinions by applying the "prudent person" standard. Finally, the panel opinion grants improper deference to the views of the Secretary of Labor. These issues are of significant import. For these reasons, the present Petition for a writ of certiorari should be granted.

Respectfully submitted, this 22nd day of May, 1998.

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APPENDIX A

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8934

D.C. Docket No. 1:92-CV-1474-HTW

ALEXIS M. HERMAN, Secretary of the
United States Department of Labor,

Plaintiff-Appellee,

versus

NATIONSBANK OF GEORGIA, N.A.;
SOVRAN CAPITAL MANAGEMENT
CORPORATION, a Virginia Corporation,

Appeal from the United States District Court
for the Northern District of Georgia

(February 25, 1998)

On Petition For Rehearing

Before COX and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

In its petition for rehearing, NationsBank asks us to modify our opinion, Herman v. NationsBank Trust Company (Geor-

gia), 126 F.3d 1354 (11th Cir. 1997). Specifically, NationsBank takes issue with our holding that the Polaroid ESOP participants were not given sufficient notice that they were fiduciaries with regard to the unallocated shares.

The best piece of evidence NationsBank presents in support of its petition is the Summary Plan Description ("SPD") provided to all the participants after the ESOP was established in July 1988. The SPD states in relevant part:

> Will I Be Contacted In the Event of a Tender Offer? ...
>
> In the event of a tender offer, Polaroid shareholders and Stock Equity Plan members [i.e., the participants] would be asked if they want to sell or 'tender' their shares.
>
> Important: If a plan member does not respond, that plan member is assumed to be deciding *against* the tender offer.
>
> Unallocated stock will be tendered in the same proportion as the allocated shares.
>
> Example: If 10% of the allocated shares are tendered by plan members, 10% of the unallocated shares also would be tendered.

(italics in original). NationsBank argues that this statement in the SPD put the participants on notice that their actions in regard to the allocated shares would control the tendering of the unallocated shares, and as a result the participants were fiduciaries with regard to the unallocated shares. We disagree. None of the evidence NationsBank presents changes our conclusion that the participants are not fiduciaries under ERISA.

Assuming everything NationsBank says in its rehearing petition is true, the most it shows is that at the time the SPD was distributed the participants had notice that, in the event of a tender offer, their actions in regard to the allocated shares would control the tendering of the unallocated shares. That evidence is not enough to put the participants on notice that they were fiduciaries with regard to the unallocated shares. The participants could not be fiduciaries with regard to the unallocated shares in the absence of explicit notice that they could be held liable for

their actions with regard to the unallocated shares. We emphasized that point in our previous opinion when we stated that the possibility of the participants being subjected to liability as fiduciaries for their actions with regard to the unallocated shares was "unacceptable . . . where participants are not adequately informed of the responsibilities they possess and the liability that could go hand in hand with those responsibilities." Id. 126 F.3d at 1367 (emphasis added). Nothing in the SPD or in the materials NationsBank sent the participants concerning the tender offer put the participants on notice that they could be held liable as fiduciaries for their actions with regard to the unallocated shares.

Our reasoning makes it unnecessary for us to decide whether notice in an SPD of potential liability would have been enough absent notice in the proxy statement. Likewise, it is unnecessary for us to address the broader question of whether ESOP participants can under any circumstances be named fiduciaries for unallocated shares. As we noted in our previous opinion: "[b]ecause ESOP participants could conceivably face liability to other persons and entities if they were named fiduciaries with regard to unallocated shares, we are not sure that such status could be forced upon participants even with sufficient notice. A plan might be required to give participants a chance to opt-out from such responsibilities and liabilities. However, we need not and do not decide that matter." Id., 126 F.3d at 1367, n. 11.

The petition for rehearing is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8934

D.C. Docket No. 1:92-CV-1474-HTW

ALEXIS M. HERMAN, Secretary of the
United States Department of Labor,

Plaintiff-Appellee,

versus

NATIONSBANK TRUST COMPANY
(Georgia), National Association,
a National Banking Association,

Defendant,

SOVRAN CAPITAL MANAGEMENT
CORPORATION, a Virginia Corporation;
NATIONSBANK OF GEORGIA, N.A.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGES:

Before COX and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

CARNES, Circuit Judge:

NationsBank of Georgia, N.A.("NationsBank") is the trustee of an employee stock ownership plan ("ESOP") governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1000-1461 ("ERISA" or "the Act").[1] The Secretary of the Department of Labor brought this lawsuit against NationsBank, claiming it had violated ERISA by failing to exercise independent judgment in responding to competing tender offers for the ESOP's shares. After the district court denied both parties' motions for summary judgment, NationsBank brought this interlocutory appeal pursuant to 28 U.S.C. § 1292(b). For the reasons set forth below, we affirm in part and reverse in part the district court's order denying summary judgment to both parties.

I.
BACKGROUND

A. FACTS

This case arose out of a battle over control of Polaroid Corporation ("Polaroid"). The facts below are not disputed by the parties.

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1 An employee stock ownership plan is an ERISA plan which invests primarily in the employer's stock. See 29 U.S.C. § 1107(d)(6)(A).

1. The Genesis of the Polaroid ESOP

In 1988, Polaroid was the subject of a hostile takeover attempt by Shamrock Acquisitions, III, Inc.("Shamrock"). Partly in response to the takeover threat, Polaroid established an ESOP called the Polaroid Stock Equity Plan.[2] Eventually Polaroid named Citizens & Southern Trust Company, later known as NationsBank, as the trustee of the ESOP. Sovran Capital Management Corporation was retained to provide investment advice to NationsBank.

At its inception, the Polaroid ESOP held over 9.7 million shares of newly-issued Polaroid common stock, constituting 13.4% of Polaroid's common stock. The ESOP shares were purchased with a $15 million cash contribution from Polaroid and $285 million that Polaroid loaned the ESOP.[3] Polaroid funded the ESOP by imposing a 5% pay cut and reducing benefits.

ESOP shares purchased with Polaroid's cash contribution were allocated to accounts for ESOP participants in proportion to each participant's compensation. ESOP shares that were purchased with the loaned funds were held and continue to be held in a suspense account, the "Unallocated Common Stock Account," as collateral for the loan. As the ESOP makes loan payments to Polaroid (with contributions from Polaroid), shares are

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2 Shamrock sought an injunction against Polaroid's creation of the ESOP, claiming it was an illegal anti-takeover device. See Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 269-70 (Del.Ch. 1989). The Delaware Chancery Court denied the injunction. The court found that the ESOP's voting provisions gave plan participants control over the ESOP shares. See id. at 273-74. Based largely upon that finding, the court held that the ESOP was not an illegal anti-takeover device. See id. at 274.

3 This "paper sale" of the newly issued stock resulted in significant tax savings to Polaroid. See 26 U.S.C. § 404(a)(9); see also Summers v. State Street Bank and Trust Co., 104 F.3d 105, 106 (7th Cir. 1997) (describing a similar transaction and its tax consequences).

released from the Unallocated Common Stock Account and allocated to the individual participants' accounts in proportion to each participant's compensation.

2. Plan Provisions on Voting Shares

The Polaroid ESOP has several provisions that address the voting of ESOP shares. In general, the ESOP provides for "pass-through voting," which allows participants to vote their allocated shares like ordinary shareholders. Without that provision, the Polaroid ESOP would not qualify for tax benefits. See 26 U.S.C. § 409(e). The ESOP further provides that in the event of a tender offer, plan participants may direct the trustee to tender or not tender their allocated shares.

The ESOP prohibits the trustee from tendering a participant's shares unless the participant specifically instructs the trustee to tender. It states that the trustee should interpret a participant's silence as a direction not to tender his or her allocated shares. In addition, the ESOP provides for "mirror voting," which means that the trustee is instructed to tender unallocated shares held by the plan in the same proportion as it tenders allocated shares. According to the briefs of the amici curiae, provisions for pass-through voting of allocated shares and mirror voting of unallocated shares are commonly included in ESOPs.

According to the ESOP documents, the trustee's liability for its conduct during a tender offer depends, in part, on how well the trustee complies with the other voting provisions. The Polaroid ESOP states that Polaroid will indemnify the trustee for any liability incurred in responding to tender offers, so long as the trustee followed the participant direction provisions of the plan.

If a tender offer is accepted, the ESOP further provides that, except in limited circumstances not relevant to this appeal, the trustee must reinvest all tender offer proceeds in Polaroid stock.

3. The Tender Offers

In September 1988, Shamrock made a tender offer of $42 per share for all of Polaroid's common stock, contingent upon Shamrock obtaining a judgment in Delaware state court that the

Polaroid ESOP shares were invalidly issued. Shamrock later raised its offer to $45 per share. Polaroid responded in January 1989 with a selftender offer of $50 per share for a maximum of 16 million of the 71.5 million shares of Polaroid common stock (including the ESOP shares). The Polaroid offer provided that if more than 16 million shares were tendered, Polaroid would buy tendered shares on a pro-rata basis and return extra shares to each tenderer.

On February 23, 1989, NationsBank mailed all Polaroid ESOP participants a brief description of the competing tender offers, advising them of their rights under the plan to instruct NationsBank by March 23, 1989 either to: (1) tender to Polaroid, (2) tender to Shamrock, or (3) not tender. NationsBank informed participants that if they did not return an instruction form, their non-responses would be treated as instructions not to tender. However, the letter did not advise participants that unallocated shares would be voted in the same proportion as allocated shares.

On the same date, the Secretary of Labor sent NationsBank an unsolicited letter outlining the Secretary's view of NationsBank's fiduciary responsibilities in light of the competing tender offers. See Letter from the Department of Labor to Citizens & Southern Trust Company (February 23, 1989), reprinted in 16 Pens. & Ben. Rep. (BNA) 390 (March 6, 1989) ("Polaroid letter"). The Secretary insisted that an ESOP trustee bears the final responsibility for making tender offer decisions with regard to the plan's unallocated shares and its allocated non-voted shares.[4] The Secretary advised that a trustee may follow plan provisions relating to participant direction of such shares only to the extent permitted by § 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D). The Secretary did not suggest any restriction on a trustee following participant directions as to allocated shares that were actually voted.

On March 20, 1989, NationsBank's Trust Policy Committee met to consider the tender options on behalf of the ESOP. The Committee initially discussed the Secretary's letter and what the Committee understood to be its legal responsibilities in ten-

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4 By "allocated non-voted shares," we mean those shares that were not returned to NationsBank by participants. By operation of the Polaroid ESOP, those non-voted shares were treated as votes not to tender by NationsBank.

dering the ESOP's shares. The Committee was advised by its legal counsel that it had the responsibility of deciding how the shares could be voted prudently, and that it had the duty to disregard plan provisions if they led to an imprudent result.

The Committee then proceeded to determine the prudence of each option available to the plan. The Committee observed that the gain or loss to the plan resulting from tendering shares to either offer, or from not tendering shares, would depend upon the post-tender market situation. It noted that under the terms of the plan, the ESOP probably would be required to invest any tender proceeds in Polaroid stock purchased on the open market. The Committee noted that, if it tendered shares and the post-tender market price of Polaroid shares was less than the amount of the tender offer accepted, the ESOP would obtain more shares than it had before. However, if it tendered shares and the market price of Polaroid shares rose above the tender price before full reinvestment, the ESOP would end up with fewer shares than it had before tendering.

In making its decision about what would be prudent, the Committee attempted to predict whether post-tender market prices would exceed or fall below the tender offer prices. It noted two factors that could cause the market price to rise. First, Shamrock had expressed its intention to continue its takeover attempt. The Committee believed Shamrock might raise its offering price to over $50 per share. Second, Polaroid was involved in pending copyright litigation that could result in a billion-dollar damage award in Polaroid's favor. The Committee believed that such an award, if obtained, would greatly increase Polaroid's stock price.

Based on those considerations, the Committee concluded that the post-tender market price of Polaroid stock was uncertain enough that it would be prudent to choose any of the available options: tendering shares to the self-tender offer, tendering to the Shamrock offer, or not tendering. After reaching that conclusion, the Committee decided to follow the plan provisions on the tendering of allocated and unallocated shares held by the ESOP, i.e., as to all of the ESOP's shares.

On March 23, 1989, NationsBank tendered the ESOP shares in accordance with the provisions of the plan and the participants' votes. In all, NationsBank tendered 5,239,460 of the ESOP's shares to Polaroid. NationsBank withheld 4,332,044

shares. Of those shares 53,387 were withheld based on participants' directions not to tender. An additional 34,581 of those shares were withheld because NationsBank planned to tender those shares to Shamrock in accordance with participants' directions, but Shamrock withdrew its offer before the shares were tendered. The remaining 4,244,076 withheld shares were withheld because of the plan's mirror voting provision. NationsBank tendered all of the (non-ESOP) shares it held in discretionary trust accounts (3,900 shares) to Polaroid.

After failing in its attempt to have the Polaroid ESOP invalidated, Shamrock tendered each of its Polaroid shares to Polaroid. In all, non-ESOP Polaroid shareholders (including Shamrock) tendered 84 percent of their shares to Polaroid.

Polaroid accepted 27.7747% of the shares tendered by each tendering shareholder. Polaroid paid the ESOP $72,762,200 for the shares it tendered, and NationsBank reinvested those funds in Polaroid stock between April 3 and April 12, 1989, at prices ranging from $37.41 to $37.67 per share. As a result of the repurchase, the ESOP's stake in Polaroid was increased by 482,073 shares. If NationsBank had tendered all of the unallocated shares and the allocated non-voted shares held by the ESOP, the ESOP would have obtained an additional 332,917 shares.

B. PROCEDURAL HISTORY

The Secretary filed suit against NationsBank in 1992.[5] In Count One of the complaint, the Secretary claimed that NationsBank violated §§ 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. §§ 1104(a)(1)(A) and (B), by failing to tender all of the unallocated shares and the allocated non-voted shares to Polaroid. In Count Two, the Secretary alleged that an indemnification provision in the ESOP, which stated that Polaroid would indemnify NationsBank for any liability incurred in responding to tender offers so long as NationsBank followed the participant direction provisions of the plan, created a disincentive for NationsBank to exercise its independent judgment and, therefore, encouraged NationsBank to breach its fiduciary obligations under ERISA.

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5 Lynn Martin was the Secretary of the Department of Labor in 1992 and the original plaintiff in this action. Robert Reich succeeded Martin in 1993 and was substituted as the plaintiff. Alexis Herman is now Secretary of the Department of Labor and has been substituted as the plaintiff.

The district court granted summary judgment to the Secretary on Count Two of the complaint. The court agreed with the Secretary's view that the indemnification provision provided NationsBank with a financial incentive to refrain from exercising its independent judgment. See Martin v. NationsBank of Georgia, N.A., 16 Employee Benefits Cas. (BNA) 2138, 2141, 1993 WL 345606 (N.D.Ga. 1993). That incentive, the court held, violated general trust law principles and ERISA's command that trustees act solely in the interests of participants and beneficiaries. See id.

The parties proceeded with discovery on Count One of the Secretary's complaint. After completing discovery, both parties moved for summary judgment on Count One. In an order and opinion, the court held that NationsBank could not rely upon participants' votes of their allocated shares and the ESOP's mirror voting provision in deciding whether and how to tender unallocated shares. Instead, the court held, NationsBank was required to exercise its independent judgment and follow plan provisions only if they led to a prudent result. The court also held that NationsBank possessed the exclusive responsibility for deciding whether to tender allocated non-voted shares, and that ERISA barred NationsBank from interpreting participants' non-responses as directions not to tender.

However, the court did not grant summary judgment in favor of the Secretary, because it held that genuine issues of fact exist regarding whether NationsBank acted prudently in not tendering to Polaroid the ESOP shares in question, i.e., all of the ESOP shares except the allocated ones that were actually voted. It also held that genuine issues of fact exist as to whether NationsBank acted solely in the interest of plan participants.

NationsBank requested that the district court certify for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), its order denying the parties' motions for summary judgment on Count One of the Secretary's complaint. NationsBank did not seek certification of the court's order as to Count Two, in which the court had struck down the indemnification provision. The district court did certify its order as to Count One, recognizing that there is substantial ground for difference of opinion as to "the

proper standard to be applied to the Trustee's decision on whether to follow the plan document and tender unallocated shares as directed by the participants." We granted permission for the interlocutory appeal.[6]

II.
STANDARD OF REVIEW

Summary judgment should be granted only when there is no genuine issue regarding a material fact, and judgment is appropriate as a matter of law. See Fed.R.Civ.P. 56. This Court must apply the same legal standards that the district court was required to apply in its summary judgment decision; therefore, the district court's legal conclusions are subject to de novo review. See Southern Solvents, Inc. v. New Hampshire Ins. Co., 91 F.3d 102, 104 (11th Cir. 1996).

III.
DISCUSSION

This appeal requires us to apply ERISA's fiduciary rules to a species of ERISA plans, the ESOP.

A. STANDARDS GOVERNING THE MANAGEMENT OF ASSETS BY ERISA TRUSTEES AND FIDUCIARIES

ERISA sets out a fiduciary scheme that applies to all employee benefit plans including ESOPs. It requires that the assets of an employee benefit plan be held in trust by at least one trustee. See 29 U.S.C. § 1103(a). Generally, "the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan." Id. Where the trustee has the exclusive authority and discretion to manage and control plan assets, the trustee is the quintessential fiduciary. Under ERISA:

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary au-

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6 Although the district court discussed only the unallocated shares issue in its order certifying its summary judgment order for interlocutory appeal, we have the entire summary judgment order before us pursuant to 28 U.S.C. § 1292(b). See, e.g., Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996). Both parties have argued the allocated non-voted shares issue as well as the unallocated shares issue, and we will address both issues.

> thority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee . . . , or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.A. § 1002(21)(A) (West Supp. 1997).

Insofar as a trustee has fiduciary authority and control over plan assets, a trustee is governed by ERISA's strict fiduciary rules. "ERISA imposes high standards of fiduciary duty upon those responsible for administering an ERISA plan and investing and disposing of its assets." Martin v. Feilen, 965 F.2d 660, 664 (8th Cir. 1992); see also 29 U.S.C. § 1104(a) (containing standards for fiduciaries). Indeed, the standard of care owed by ERISA fiduciaries, including trustees, has been described as "the highest known to law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (Friendly, J.). ERISA mandates, among other requirements, that:

> (1) a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . .;
>
> (C) by diversifying the investments of the plan . . . [a requirement not applicable to ESOPs, See 29 U.S.C. § 1104(a)(2)]; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA] . . . .

29 U.S.C.A. § 1104(a) (West 1985 & West Supp.1997). ERISA also subjects fiduciaries to personal liability for breaching the duties imposed by § 1104(a), see id. § 1109, and for certain breaches by co-fiduciaries of their duties, see id. § 1105.

As we mentioned above, ERISA provides that trustees usually shall have exclusive authority and control over plan assets. However, ERISA allows a plan to allocate authority and control over plan assets to parties other than trustees, if that allocation fits one of three exceptions. In the first exception, the plan may delegate the authority to manage plan assets to one or more investment managers. See id. § 1103(a)(2). In the second exception, the plan may provide for individual participant accounts and give participants control over the assets in their accounts. See id. § 1104(c). Under applicable regulations the participant account exception in § 1104(c) does not apply to ESOPs; the Secretary has interpreted that provision to apply only to plans giving participants a range of investments from which to choose. See 29 C.F.R. § 2550.404c-1 (1996). In the third and final exception, the plan may provide "that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee . . . ." 29 U.S.C. § 1103(a)(1).

If a plan falls under one of the three exceptions to exclusive trustee authority, then the responsibilities of the trustee are correspondingly lessened. For example, if the plan provides that an investment manager has the authority to control plan assets, then the trustee is not liable for losses caused by the investment manager. see id. § 1105(d)(1); see also Lowen v. Tower Asset Mgt., Inc., 829 F.2d 1209, 1219 (2d Cir. 1987). Or, if a plan gives participants control over individual accounts pursuant to 29 U.S.C. § 1104(c) (which is not applicable to ESOPs), the trustee is not liable for any loss caused by any breach which results from the participant's exercise of control over those assets. see 29 U.S.C. § 1104(c)(2)(B).

Finally, because of the third exception, to the extent that a plan allocates the authority to manage and control plan assets to a named fiduciary, the trustee becomes "subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter. . . ." Id. § 1103(a)(1) (West 1985). In other words, insofar as a trustee acts at the direction of a named fiduciary in accordance with the

terms of the plan and ERISA's requirements, he is not subject to the fiduciary requirement in § 1104(a) to act prudently. See Maniace v. Commerce Bank of Kansas City, N.A., 40 F.3d 264, 267 (8th Cir. 1994) (holding that directed trustee was not acting as a fiduciary in following named fiduciary's direction and did not need to weigh the merits of those directions). But see FirsTier Bank, N.A. v. Zeller, 16 F.3d 907, 911 (8th Cir. 1994) (holding that trustee, who was subject to direction of the plan sponsor to make loans to plan participants, was not relieved of its fiduciary duty to conform to the prudent man standard of care in making loans).

In this appeal, we are concerned with the third exception, the one provided in 29 U.S.C. § 1103(a)(1) for trustees who are directed by named fiduciaries. Specifically, we must decide whether Polaroid ESOP participants may be named fiduciaries who can direct NationsBank's asset management decisions with regard to unallocated shares and allocated but non-voted shares.

B. THE PARTIES' CONTENTIONS

NationsBank argues that participants in the Polaroid ESOP are named fiduciaries with respect to the tendering of all shares held by the ESOP, making NationsBank merely a directed trustee with regard to the tendering of ESOP shares, subject only to § 1103(a)(1)'s commands to follow plan provisions that are not contrary to ERISA. In NationsBank's view, it cannot be held liable for making imprudent tendering decisions, because it is not governed by the prudent man standard in § 1104(a)(1)(B). This litigation position is, of course, contrary to NationsBank's conduct. As we have previously discussed, pursuant to counsel's advice, NationsBank undertook to determine what action was prudent as to the ESOP shares. Only after determining that any and all actions in response to the tender offer would be prudent did NationsBank follow participant directions according to the plan.

NationsBank's fallback position in this litigation is that even if § 1104(a)(1)(B) applies to NationsBank's conduct in tendering the shares, it may not be held liable because it acted prudently. The district court held that the question of NationsBank's prudence could only be decided after a trial.

The Secretary takes the position that ERISA allows ESOP participants to be named fiduciaries only with respect to allocated shares for which participants give explicit directions. See Letter from the Department of Labor to Ian D. Lanoff (September 28, 1995) at 3, reprinted in 22 Pens. & Ben. Rep. (BNA) 2249, 2250 ("Lanoff letter"). She agrees with NationsBank that if a trustee follows participants' explicit directions regarding allocated shares, the trustee's conduct with respect to those shares is judged only by whether it is "in accordance with the plan terms," as well as "not being contrary to the provisions of ERISA."[7] Id. (footnote omitted). She concedes that where the plan gives participants the authority to direct the trustee's vote of the allocated shares, the directed trustee's actions concerning allocated, voted shares are judged by § 1103 (the directed trustee standard), not § 1104 (the standard for fiduciaries). See id. ("[Y]ou, as Plan trustee, may follow such directions subject to the standards of section 403(a) [29 U.S.C. § 1103(a)] described above.").

The Secretary distinguishes the exercise of control by plan participants over unallocated shares and allocated non-voted shares held by an ESOP from the exercise of control over allocated voted shares. She takes the position that participants may never be named fiduciaries with regard to unallocated shares or allocated non-voted shares, and, therefore, that participants cannot direct a trustee pursuant to 29 U.S.C. § 1103(a)(1) with regard to those shares. Unless another exception to trustee responsibility and liability is applicable, the Secretary's position is that § 1104(a)(1), including the prudent man standard, governs a trustee's decisions with respect to unallocated and allocated non-voted shares.

The Secretary also makes a more narrow argument in this appeal with regard to the unallocated shares. She maintains that even if ESOP participants may be named fiduciaries with regard to unallocated shares in some circumstances, the Polaroid ESOP participants were not named fiduciaries with regard to the unallocated shares in their plan, because the tender notice did

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7 The trustee's conduct in following explicit directions with regard to allocated shares—as distinguished from the trustee's conduct relating to unallocated shares or allocated non-voted shares—would not be subject to a prudence test. See Lanoff letter at 3-4, reprinted in 22 Pens. & Ben. Rep. (BNA) 2249, 2250-51.

not inform the participants that their action or inaction would affect the unallocated shares.

The Secretary further contends that the only prudent decision for NationsBank to make in light of the competing tender offers was to tender all of the ESOP's shares to Polaroid. According to the Secretary, NationsBank violated § 1104(a)(1)(B) in two ways: (1) by tendering unallocated shares in proportion to the plan participants' votes of their allocated shares, as the plan provided, instead of tendering all of the unallocated shares to Polaroid; and (2) by not tendering to Polaroid allocated shares for which NationsBank received no explicit directions from the plan participants. However, the Secretary does not challenge NationsBank's decision to tender allocated voted shares in accordance with participants' directions, even where those directions were to tender to Shamrock or not to tender. The Secretary has no quarrel -- at least in this case -- with NationsBank following the explicit directions of plan participants as to the shares allocated to the participants, even if the directed action was imprudent.

C. DEFERENCE TO THE SECRETARY'S INTERPRETATION

We begin by acknowledging the deference we owe the Secretary's interpretation of the controlling act. The Secretary of the Department of Labor is charged with enforcing ERISA and its fiduciary duties, and she has the authority to render authoritative interpretations of the Act. See 29 U.S.C. § 1132(a)(2). Unless Congress, in enacting ERISA, demonstrated clearly its intent with regard to the questions before us, we must defer to the Secretary's official interpretations of ERISA if they are reasonable. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); Jaramillo v. Immigration and Naturalization Serv., 1 F.3d 1149, 1152 (11th Cir. 1993) (en banc). Neither NationsBank nor the Secretary contends that Congress has spoken directly to the ERISA issues presented in this appeal, and we conclude that Congress' intent on these matters is less than clear.

Consequently, our role in this case is quite limited, at least where the Secretary has taken an official position:

> Under Chevron a court is not to search for what in the court's view is the best possible construction of the statute . . . . Realizing that administrators and judges might well disagree about the wisdom of a policy behind an agency's construction of a statutory provision, the Supreme Court admonished courts not to forget to whom the authority and responsibility for such policy making is entrusted[.]

Jaramillo, 1 F.3d at 1152-53.

NationsBank claims we should not give Chevron deference to the Secretary's interpretation of ERISA, because that interpretation is espoused only in litigation documents and opinion letters, and not in formal regulations. That position may have validity as to litigation documents, but not as to pre-litigation opinion letters, at least not in this circuit. Although the Secretary has not promulgated regulations on the issues presented in this appeal, we still owe her pre-litigation opinion letter views considerable deference. See Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1172 (11th Cir. 1988) (deferring to agency interpretation of regulation in opinion letter); Williams v. Wright, 927 F.2d 1540, 1545 (11th Cir. 1991) ("Although these [Department of Labor/ERISA] opinion letters are not binding in this court, the views of the agency entrusted with interpreting and enforcing the ERISA statute carry considerable weight."); Coca Cola Co. v. Atchison, Topeka, and Santa Fe Ry. Co., 608 F.2d 213, 222 (5th Cir. 1979) (holding that agency opinion letters interpreting regulations, "although less authoritative than regulations or formal decisions, are entitled to be 'weighed carefully' and to 'great deference' if they state a reasonable conclusion") (citation omitted); see also State of Georgia Dept. of Medical Assistance v. Shalala, 8 F.3d 1565, 1569 & n.8 (11th Cir. 1993) (deferring to agency explanatory manual interpreting statute over which agency has been delegated administrative authority). On those matters in this appeal where the Secretary made an official pronouncement before this litigation began, we must accord her view deference.

According to NationsBank, we should also refuse to defer to the Secretary's interpretations of ERISA, because the Secretary invoked the deliberate process privilege during discovery.[8] NationsBank fails to cite any cases holding that an agency's interpretation of a statute does not deserve deference if the agency invokes that privilege. Even if NationsBank presented persuasive authority on this matter, however, we would be reluctant to address the issue. The district court's order denying summary judgment to both parties, from which NationsBank has appealed, did not address this question. NationsBank did not raise the issue before this Court until it submitted its reply brief. Under these circumstances, we decline to decide whether an agency's interpretation of a statute deserves less deference due to the invocation of the deliberative process privilege. See United States v. Coy, 19 F.3d 629, 632 n.7 (11th Cir. 1994) (holding that arguments raised for the first time in reply brief are not properly before the court). We will afford the Secretary the same deference that we would apply if she had not invoked the privilege.

NationsBank and amici curiae also argue that the Secretary's position in this litigation is inconsistent with her most recent pronouncement on the relevant issues and, therefore, it does not deserve deference. However, after reviewing the relevant documents, we find no inconsistency between the Secretary's positions in this litigation and any of her other pronouncements on the relevant issues. According to the documents cited by both parties, the Secretary has consistently maintained that the fiduciary responsibility of managing unallocated ESOP shares resides with the trustee, not with the plan participants. See Polaroid letter at 3, reprinted in 16 Pens. & Ben. Rep. (BNA) at 390; Lanoff letter at 3, reprinted in 22 Pens. & Ben. Rep. (BNA) at 2250. She is entitled to deference on that view. The Secretary also has consistently taken the position that a trustee may follow participants' directions regarding those shares only insofar as the directions are prudent, in accordance with the plan, and not con-

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8 The deliberative process privilege "protects the internal decision making processes of the executive branch in order to safeguard the quality of agency decisions." Nadler v. United States Dept. of Justice, 955 F.2d 1479, 1490 (11th Cir. 1992).

trary to ERISA.[9] Polaroid letter at 3, reprinted in 16 Pens. & Ben. Rep. (BNA) at 390; Lanoff letter at 4, reprinted in 22 Pens. & Ben. Rep. (BNA) at 2250-51. Furthermore, the Secretary has consistently maintained that the trustee of an ESOP always retains fiduciary responsibility for voting allocated non-voted shares. See Letter from the Department of Labor to John Welch, Latham & Watkins (April 30, 1984), reprinted in 11 Pens. & Ben. Rep. (BNA) 633 (May 7, 1984); Lanoff letter at 4, reprinted in 22 Pens. & Ben. Rep. (BNA) at 2251. We will defer to the Secretary's judgment on those points, if we conclude that her positions are reasonable.

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9 The Lanoff letter stated the Secretary's position with respect to unallocated shares as follows:

...To the extent the plan provisions instruct the trustee to pass through decisions regarding tender offers and/or proxy voting to the plan participants, a plan trustee may follow such plan provisions only to the extent permitted by section 404(a)(1)(D) of ERISA.

The existence of a plan provision purporting to require that a trustee follow a particular course of action -- in this case participant directions with respect to a tender offer or a proxy vote -- does not diminish the extent of the trustee's duty to diligently investigate and evaluate the merits of the course of action required by the plan document to determine that the instructions are consistent with titles I and IV [of ERISA].

Id. at 3-4, reprinted in 22 Pens. & Ben. Rep. (BNA) at 2250-51.

There is one difference between the Secretary's earlier pronouncements and the Lanoff letter, but it is does not diminish the weight we give to the Secretary's view. Previously, the Secretary had said trustees may follow participants' instructions on voting or tendering unless those instructions are imprudent, contrary to the plan, or contrary to ERISA. See Polaroid letter at 3, reprinted in 16 Pens. & Ben. Rep. (BNA) at 390. In the Lanoff letter, the Secretary said the trustee must follow such directions unless the trustee "can articulate well-founded reasons why doing so would give rise to a violation of titles I or IV ..., for example, the prudence requirements of title I." See Lanoff letter at 4, reprinted in 22 Pens. & Ben. Rep. (BNA) at 2250-51.

If the Secretary had sued NationsBank for not following plan provisions that were prudent and lawful, then the shift in the Secretary's position (from a trustee may follow prudent and lawful instructions to a trustee must follow prudent and lawful instructions) would be relevant to this case. However, that is not the dispute in this case, and we reject NationsBank's argument that the Lanoff letter diminishes the weight of the Secretary's position in this case.

D. ANALYSIS: THE UNALLOCATED SHARES

1. Whether Polaroid ESOP Participants Are Named Fiduciaries

The Secretary contends that ESOP participants are not and cannot be named fiduciaries with regard to unallocated shares, because they can never satisfy ERISA's definition of named fiduciaries with regard to those shares. In the alternative, the Secretary argues more narrowly that as to the unallocated shares the Polaroid ESOP participants did not meet the definition of named fiduciaries during the Polaroid tender offer battle, because the tender notice did not inform them of their power and control over the unallocated shares.

The Secretary's more narrow position is not espoused consistently in pre-litigation position papers, and, therefore, it is not entitled to deference. Nevertheless, without deciding the broader definitional question, we hold that the Secretary's more narrow position is correct, which is to say it coincides with our own view.

In ERISA, a "named fiduciary" is defined as:

> a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

29 U.S.C.A. § 1102(a)(2) (West 1985). According to this definition, a person may not be a named fiduciary in a given situation unless: (1) he meets ERISA's definition of a fiduciary and (2) he is identified as a fiduciary, either in the plan or through a procedure described in the plan.

The Secretary contends, and we agree, that the Polaroid ESOP participants did not meet the definition of fiduciaries during the Polaroid tender battle. As we have mentioned previously, ERISA specifies that:

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting man-

> agement of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee . . ., or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.A. § 1002(21)(A) (West Supp.1997). The plain language of the definition clearly states that a person is not a fiduciary unless he either has discretion or exercises authority or control with respect to plan assets. If a person does not have discretion or exercise authority or control in a given situation, he does not meet the definition of a fiduciary.

NationsBank contends that the Polaroid ESOP participants had the discretion to vote the ESOP's unallocated shares and that they exercised control through their votes. Therefore, NationsBank claims, the participants were fiduciaries during the tender offer battle and they could satisfy the definition of named fiduciaries with regard to the unallocated shares. NationsBank argues that the participants, and not NationsBank, had the responsibility for determining how the unallocated shares should be voted.

The Secretary responds that the Polaroid ESOP participants could not satisfy the definition of fiduciaries, because whatever control they had over the unallocated shares was unknown to them because the participants were not fiduciaries, the Secretary argues, they could not meet the definition of named fiduciaries, either. In the Secretary's view, NationsBank remained ultimately responsible for determining the voting of the unallocated shares.

We conclude that the language of ERISA supports the Secretary's position. As we mentioned above, a fiduciary must have discretion to decide the disposition of plan assets or must exercise authority or control over plan assets. The term "discretion" means the "power of free decision or choice" or "individual judgment." Webster's Third New International Dictionary 647 (1986). In order to have the power of decision or choice, a person must know that he can decide an issue and be aware of the choices he has. A person cannot exercise the power of choice or individual judgment unless he is aware of his ability to do so. To "exercise" is to "make effective in action," id. at 795, and a per-

son must have knowledge of his authority or power to control in order to exercise control. In order for a fiduciary to exercise discretion, the fiduciary must engage in conscious decision making or knowledgeable control over assets. Based on the plain language of ERISA, ESOP participants are not fiduciaries when they do not knowingly decide how assets will be managed. Or, restated in the terms of this case, ESOP participants are not fiduciaries with regard to unallocated shares when they are not given notice that their action or inaction with regard to their allocated shares will control the disposition of the unallocated shares.

This rule makes sense, given the responsibilities that go along with being an ERISA fiduciary. In enacting ERISA, one of Congress' primary goals was to devise a system whereby plan participants and beneficiaries could hold fiduciaries accountable for their obligations:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C.A. § 1001(b) (West 1985); see also Lowen v. Tower Asset Mgt., Inc., 829 F.2d 1209, 1218 (2d Cir. 1987) ("ERISA was deliberately structured so that legal responsibility for management of ERISA plans would be clearly located."). Named fiduciaries and all other fiduciaries are subject to the strict fiduciary standards in 29 U.S.C. § 1104, and they may be sued for breaching those standards. See 29 U.S.C. § 1109 (fiduciary may be held liable for breaching any duty imposed upon fiduciaries by ERISA); see also IIA Scott on Trusts § 185 (4th ed. 1987) (stating that if the holder of the power to direct a trustee is a fiduciary, the holder is subject to liability for the exercise or nonexercise of that power). If ERISA did not limit the definition of fiduciaries to those with knowledge of their authority and discretion, then persons or entities could become subject to fiduciary liability without notice. Such a result would not only be unfair, but it would also disserve a core purpose of ERISA, which is to create a system whereby accountable fiduciaries are moti-

vated by their accountability to protect the interests of participants in ERISA plans.

We note that Congress considered the implications of fiduciary liability for participants in a context that is similar to the situation before us, and in that context Congress devised a result that is markedly different than the one NationsBank proposes here. 29 U.S.C. § 1104(c)(1) addresses fiduciary responsibility and liability in plans that provide for individual participant accounts and which give participants a range of investments from which to choose. See 29 C.F.R. § 2550.404c-1 (1996). In that subsection, Congress acknowledged that such plans may give participants control over their own accounts. See 29 U.S.C. § 1104(c)(1). If those plans so provide, the trustee is free from liability arising out of participants' decisions over their accounts. See id. § 1104(c)(1)(B). The subsection further specifies that such participants will not be deemed fiduciaries as a result of exercising control over their own accounts. See id. § 1104(c)(1)(A). Judging from § 1104(c)(1), Congress wanted to prevent participants from being saddled with ERISA liability when they exercise control only over their own allocated assets. That is entirely consistent with ESOP participants not being liable for exercise of control over their own allocated shares, at least not liable beyond the loss of value to those very shares.

Yet, NationsBank asks us to go beyond that and read into ERISA a shift from itself to plan participants of the liability for managing the unallocated assets held by the ESOP. We should do that, NationsBank says, because there is no provision in ERISA that differentiates between allocated and unallocated shares or that expressly prohibits participants from being named fiduciaries.[10]

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10 We note that if the Secretary had taken the position that participants may not be named fiduciaries with regard to allocated voted shares, her position might be in conflict with the tax code. 26 U.S.C. § 409(e) requires that ESOPs either give participants pass-through voting of allocated shares or lose the tax benefits Congress created for ESOPs. The Secretary's position that participants may be named fiduciaries with regard to allocated shares appears to be an attempt to keep ERISA law and tax law consistent. However, NationsBank has not suggested that the Polaroid ESOP participants must be named fiduciaries with regard to unallocated shares in order for tax law and ERISA to be consistent.

We think it is enough distinction that making participants named fiduciaries with regard to unallocated shares, at least where they do not knowingly exercise control over those shares, violates congressional intent as demonstrated in ERISA's definitions of fiduciaries and named fiduciaries. Furthermore, 29 U.S.C. § 1104(c), which addresses a situation analogous to the one in this case, indicates congressional approval of participant control over allocated assets, but shows no approval of participant control over unallocated assets.

Congress may have considered the strikingly different situations presented by giving participants control over their allocated shares versus control over unallocated shares. When participants vote or tender their allocated shares, their decisions affect their own accounts, rather than the unallocated assets of the plan. With allocated shares the person injured by a participant's imprudent decision is that participant. By contrast, if participants are given the ultimate control over unallocated shares, their imprudent decisions affect the interests not only of themselves but also the interests of their co-participants. If many participants acted imprudently, or merely neglected to respond, under a plan containing a mirror voting provision, the unallocated share pool could suffer significant losses. One participant might lose part of the value of his stake in the unallocated share pool due to another participant's imprudent decision or non-decision.

Moreover, insofar as participants are named fiduciaries with regard to their own shares, the risk of liability they face is minimal. Participants will not sue themselves for making imprudent decisions regarding their own shares. In effect, the Secretary's position that participants may be named fiduciaries with regard to allocated shares treats participants like normal shareholders, whose liability for acting imprudently is limited to the loss of their own shares.

By contrast, if participants are named fiduciaries with regard to unallocated shares, as a result of their actions they may face risks of liability extending beyond loss of value in their own shares. NationsBank has pointed to nothing in ERISA that would bar co-participants, the ESOP itself, or the Secretary from suing participants when they make imprudent decisions with regard to unallocated shares. We find NationsBank's position to be unacceptable, at least where participants are not adequately informed

of the responsibilities they possess and the liability that could go hand in hand with those responsibilities.[11]

Here, the participants were not given sufficient notice of the fact that their votes would control the unallocated shares. The only evidence in the record indicating any knowledge on the part of the Polaroid participants that their votes would control the unallocated shares is an affidavit of a Polaroid employee representative, which states that many employee participants were told of the mirror voting provision. From that affidavit, we cannot tell whether all of the participants were given notice at any time regarding how the mirror voting provision works. More importantly, we know that the Polaroid ESOP participants definitely were not told about the mirror voting provision in the materials NationsBank sent the participants in connection with the tender offer. That written notice stated that each participant could "indicate your instructions regarding Shares and associated Rights credited to your account in the ESOP," and that if the participant failed to do so, that failure would be treated as an instruction not to tender his allocated shares. The written notice is conspicuous for its failure to mention anything about the unallocated shares.

The implication of the notice NationsBank sent to the Polaroid participants is that they controlled only their allocated shares. Indeed, NationsBank itself understood, at the time of the tender offer votes, that its Trust Policy Committee had the final say on how the unallocated shares would be voted, and that the Committee had the duty to pick a prudent option for the participants. At the Trust Policy Committee meeting on March 20, 1989, the Committee noted that its conduct was governed by 29 U.S.C. § 1104 and ERISA forbade it, as trustee, from following plan provisions on voting if such provisions led to an imprudent result. The Committee believed that it had a fiduciary obligation to independently determine whether each tender option was prudent for the ESOP, and it in fact conducted a

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11 Because ESOP participants could conceivably face liability to other persons and entities if they were named fiduciaries with regard to unallocated shares, we are not sure that such status could be forced upon participants even with sufficient notice. A plan might be required to give participants a chance to opt-out from such responsibilities and liabilities. However, we need not and do not decide that matter.

prudence analysis with regard to each option. The invisible premise of NationsBank's argument that the participants knowingly exercised discretion and control over those unallocated shares is that the participants understood the plan and ERISA better than NationsBank did at the time. We suspect that NationsBank's implicit modesty is less anchored in sincerity than it is driven by the situational winds of this litigation.

We hold that under the circumstances of this case, the Polaroid ESOP participants could not meet the definitional standard for an ERISA fiduciary with regard to the unallocated shares. Furthermore, because no person can be a named fiduciary under ERISA without first satisfying the definition of a fiduciary, the Polaroid ESOP participants were not named fiduciaries, either.[12] Thus, we conclude that the Secretary's position on unallocated shares is a persuasive one, at least in the circumstances where notice sent the participants concerning the tender offer failed to inform them of the effect their action or inaction would have on the unallocated shares.[13]

2. The Proper Standard to Apply to NationsBank's Conduct

Since Polaroid ESOP participants are not named fiduciaries with regard to unallocated shares, 29 U.S.C. § 1103(a)(1) and its directed trustee standard do not govern NationsBank's

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12 Because the Polaroid ESOP participants do not meet the definition of fiduciaries with regard to unallocated shares and, for that reason, they do not meet the definition of named fiduciaries with regard to those shares, we need not address whether the Polaroid ESOP participants are sufficiently identified as fiduciaries in the plan to meet the second part of the definition of named fiduciaries. See 29 U.S.C. § 1102(a)(2) (defining named fiduciary as a fiduciary who is identified as a fiduciary in the plan).

13 The Secretary argued yet another reason why ERISA prohibits participants from being named fiduciaries with regard to unallocated shares. The Secretary contends that present participants have a conflict of interest with future participants and, for that reason, present participants may not make decisions affecting future participants. The district court relied in part on this ground in denying NationsBank's motion for summary judgment. However, we need not and do not decide in this case whether present plan participants have a conflict of interest with future plan participants. That the Polaroid ESOP participants were not told about their control over the unallocated shares at the time they were given the tender offer choices is enough to decide the issue involving those shares in this appeal

conduct with regard to the tendering of those shares. Instead, NationsBank retained the exclusive fiduciary authority to manage those shares, and its conduct with regard to those shares is governed by the fiduciary standards in 29 U.S.C. § 1104(a)(1). According to § 1104(a)(1)(D), NationsBank was obligated to determine whether the plan provisions regarding the voting of unallocated shares were contrary to ERISA. See id. NationsBank also was required to determine whether it was prudent to tender the unallocated shares, and if so, to whom, see 29 U.S.C. § 1104(a)(1)(B), and it had the duty to act solely in the interest of the plan participants, see id. § 1104(a)(1).

a. Contrary to ERISA

We agree with NationsBank that a provision instructing a trustee to vote unallocated shares in the same proportion as participants vote their allocated shares is not per se contrary to ERISA. The Secretary has not contended otherwise; she has taken the position that a trustee should follow a mirror voting provision unless doing so leads to a violation of § 1104(a)(1), e.g., an imprudent result.[14] See Lanoff letter at 4, reprinted in 22 Pens. & Ben. Rep. (BNA) at 2251. We do not find fault with NationsBank merely for attempting to comply with the mirror voting provision.

b. The Prudence of NationsBank's Conduct

However, NationsBank could not follow the ESOP's mirror voting provision blindly if the participants' votes led to an imprudent result. See 29 U.S.C.A. § 1104(a)(1)(D) (West Supp.1997) (providing that trustee must act prudently and "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]") (emphasis added); Central States Pension Fund v. Central Transport, Inc., 472 U.S. 559, 568, 105 S. Ct. 2833, 2839, 86 L. Ed. 2d 447 (1985) ("Trust documents cannot excuse trustees from their duties under

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14 Further support for concluding that mirror voting provisions are not contrary to ERISA is found in the tax code. Congress has conditioned tax benefits for plans holding non-registered securities on the inclusion of a mirror voting provision. See 26 U.S.C. § 409(e)(5). That tax provision does not cover the Polaroid ESOP, because this plan holds registered securities. Nevertheless, it indicates congressional approval of mirror voting in some instances.

ERISA."); Ershick v. Greb X-Ray Co., 705 F. Supp. 1482, 1487 (D.Kan. 1989) (holding that ESOP trustee was required to follow plan document only to extent such actions were consistent with ERISA; if following plan document caused imprudent result, trustee would violate § 1104(a)(1)(D)); Utilicorp United Inc. v. Kemper Fin. Serv., 741 F. Supp. 1363, 1365-66 (W.D.Mo. 1989) (holding that adherence to plan document provisions not sufficient to satisfy ERISA duty of prudence); cf. DeBruyne v. Equitable Life Assurance Soc'y, 920 F.2d 457, 464-65 (7th Cir. 1990) (analyzing prudence of investment action "regardless of whether it comported with [alleged plan documents]"); Central Trust Co. v. American Avents Corp., 771 F. Supp. 871, 874-76 (S.D.Ohio 1989) (holding that "pass-through voting of allocated shares is not improper per se, but is inappropriate when the exercise thereof conflicts with the fiduciary obligations imposed by ERISA") (citation omitted). If NationsBank determined, or should have determined, that the allocated share votes as dictated by the mirror voting provision were imprudent, then NationsBank was required to ignore that provision and vote the unallocated shares prudently notwithstanding it.[15]

We will not decide the fact-laden issue of whether NationsBank acted prudently in following the mirror voting provision, because the district court held that genuine issues of fact existed precluding summary judgment on that question. We will remand the case to the district court for determination of those factual issues and a resulting decision on the prudence question.

c. Whether NationsBank Acted Solely in the Interest of Participants

The district court did not address the issue of whether NationsBank acted solely in the interest of participants, as re-

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15 NationsBank argues that an ERISA trustee must follow a plan provision unless it is facially invalid, or unless following the provision would be an abuse of the trustee's discretion. We disagree, at least where plan participants are not sufficiently informed to be named fiduciaries. In such a situation, ERISA dictates that a mirror voting provision that leads to an imprudent result is invalid as applied. Therefore, the trustee must disregard the provision, just like it would have to disregard any other plan provision controlling the disposition of plan assets which leads to an imprudent result. See 29 U.S.C. § 1104(a)(1) (providing that a fiduciary must act in the manner a prudent man would act in managing plan assets).

quired by 29 U.S.C. § 1104(a)(1), other than to hold that genuine issues of fact exist on that question. NationsBank does not contend otherwise on appeal, and we leave it to the district court to resolve that dispute.

E. ANALYSIS: THE ALLOCATED NON-VOTED SHARES

We now turn to the question of whether plan participants may be named fiduciaries with regard to allocated non-voted shares held by an ESOP. The Secretary claims, and the district court agreed, that NationsBank violated ERISA by not tendering the allocated non-voted shares held by the Polaroid ESOP to Polaroid. The Secretary contends that: ESOP participants may not be named fiduciaries with regard to allocated non-voted shares; NationsBank was not a directed trustee with regard to those shares; and NationsBank could not rely upon the plan's provisions regarding those shares to avoid liability when those provisions led to an imprudent result. The Secretary has repeatedly and consistently pronounced the view that participants may not be named fiduciaries with regard to allocated non-voted shares. We owe it considerable deference and will uphold it if it is reasonable.

The Secretary makes both a textual argument and a policy argument to support her position that plan participants may not be named fiduciaries with regard to allocated non-voted shares. For her textual argument, the Secretary cites ERISA's requirement that a named fiduciary control a directed trustee via "proper directions." See 29 U.S.C.A. § 1103(a)(1) (West 1985) (emphasis added). According to the Secretary, directions are explicit responses only, and mere non-responses do not constitute directions to a trustee. For her policy argument, the Secretary contends that it violates ERISA's purposes to allow participants to be named fiduciaries in circumstances where they failed to return directions.

We conclude that the Secretary's interpretation of ERISA with regard to the allocated non-voted shares is unreasonable. Participants may be named fiduciaries with regard to allocated voted shares -- as the Secretary has conceded -- because participants have the discretion to decide or the ability to control how those shares should be voted. See 29 U.S.C. § 1002(21) (defining a fiduciary as a person who has discretionary authority over plan assets or who exercises control over plan assets). Partici-

pants have control over the allocated shares in their accounts. Participants do not lose control over their shares merely by failing to respond to a tender request, at least not when they are specifically told in the notice that such a response will be treated as a direction not to tender. Contrary to what the Secretary contends, a participant's informed failure to respond to a tender request is an exercise of control or discretion.

The Secretary's position that the term "directions" requires explicit responses is unreasonably strict. Directions include "guidance or supervision of action, conduct or operation." Webster's Third New International Dictionary 640 (1986). If the trustee informs participants of their choices, and participants are reminded at the time of decision how the trustee will treat non-responses to the trustee's request, then non-responses suffice as guidance, or directions, for the trustee. Indeed, the black letter law of trusts requires the trustee to follow the participants' silent directions, if the plan so provides:

> where by the terms of the trust it is provided that the trustee shall not do certain acts without the direction or consent of another, it is ordinarily his duty not to do such acts without such direction or consent.

Restatement (Second) of Trusts § 185 cmt. b (1959).

As a matter of policy, the Secretary claims that NationsBank could not have known why participants failed to return explicit directions and, for that reason, it should have exercised its independent judgment on the prudence of tendering those shares. We reject the Secretary's argument, because it is inconsistent with the Secretary's position that participants may be named fiduciaries with regard to allocated voted shares. If the Secretary views participants as sufficiently knowledgeable and accountable to bear the fiduciary responsibility of voting and tendering allocated voted shares, then there is no reason to treat them as uninformed and irresponsible when they do not explicitly respond to a tender offer after being told specifically how a non-response will be treated. We reiterate that in order for non-responses to satisfy the definition of directions, the trustee must provide participants with sufficient information regarding their options at the time it requests directions, and participants must be told at that time how the trustee will treat non-responses. So long as those re-

quirements are met, there is no reason to presume that participants do not know what they are doing when they fail to respond.

In sum, the Secretary's position regarding allocated non-voted shares is unreasonable. Even when the Polaroid ESOP participants failed to respond explicitly to NationsBank's tender request regarding their allocated shares, the participants were named fiduciaries who controlled NationsBank's conduct pursuant to § 1103(a)(1). NationsBank's conduct with regard to those shares was not governed by § 1104(a)(1), and NationsBank was not required to exercise its independent judgment in deciding how and whether to tender those shares. It only had to make sure the participants' directions were proper, in accordance with the terms of the plan, and not contrary to ERISA. See 29 U.S.C. § 1103(a)(1).

The Secretary does not argue that the Polaroid ESOP participants' directions with regard to allocated non-voted shares were not in accordance with the plan or that those directions were contrary to ERISA. She does argue, however, that participants could not give "proper directions," because they were not given adequate information about the tender options and the last-minute developments taking place before the voting deadline. We leave it up to the district court to decide in the first instance if the notice was adequate in those respects. In deciding that question, the district court should apply the standard for proper directions that the Secretary has consistently espoused, and which both parties cite in this appeal. The Secretary has explained that directions received from participants are proper if:

> [the trustee] follows procedures to assure that the eligible individual account plan's provisions are fairly implemented, that the participants have not been subjected to coercion or undue pressure in making their decisions, that necessary information is provided to the participants, [and] that clearly false information or misleading information is not distributed to the participants . . . .

Lanoff letter at 3, reprinted in 22 Pens. & Ben. Rep. (BNA) at 2250.

IV.
CONCLUSION

At least where ESOP participants are not informed at the time of a tender offer of a plan's mirror voting provision and the control the participants possess over the plan's unallocated shares, such participants are not "named fiduciaries" within the meaning of ERISA with regard to the unallocated shares. The Polaroid ESOP participants were not informed of the mirror voting provision in their plan at the time they voted. Therefore, they could not be named fiduciaries with regard to unallocated shares at the time of the Polaroid tender offer battle, and NationsBank was not a directed trustee with regard to those shares. We agree with the Secretary that NationsBank had the duty to determine how those shares could be voted prudently, and it was required to override the plan's mirror voting provision if necessary to achieve a prudent result. NationsBank also was required to act solely in the interest of participants in voting the unallocated shares.

Contrary to what the Secretary contends, however, the Polaroid ESOP participants could be named fiduciaries with regard to the allocated non-voted ESOP shares. The Secretary has conceded that ESOP participants may be named fiduciaries with regard to allocated voted shares, and they may control a directed trustee if given proper directions. We conclude that the Secretary's position that participants' "directions" must be explicit is unreasonable, at least where the participants are fully informed at the time that a failure to respond will be treated as a "no" vote. Without deciding whether the directions in this case were completely "proper," we hold that a failure to respond may under certain circumstances constitute a "direction[ ]."

Based on these conclusions, we AFFIRM in part and REVERSE in part the district court's order denying both parties' motions for summary judgment. We REMAND the case for the district court to decide: (1) whether NationsBank acted prudently or imprudently in failing to tender to the Polaroid tender offer the unallocated shares held by the plan; (2) whether NationsBank acted solely in the interest of participants in failing to tender the unallocated shares; (3) whether the instructions given to the plan participants with regard to allocated non-voted shares were proper; and (4) any other issues necessary to decide this case in a manner not inconsistent with this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
1:92-CV-1474-HTW

ROBERT REICH, Secretary of the
United States Department of Labor,

Plaintiff

vs.

NATIONSBANK OF GEORGIA, N.A.,
and SOVRAN CAPITAL
MANAGEMENT CORPORATION,

Defendants

ORDER OF COURT

This matter is before the court on defendants' motion for amendment of the court's order on summary judgment motions to permit interlocutory appeal.

In its discretion, this court may allow a section 1292 (b) interlocutory appeal of a non-final order if: (1) the order involves a controlling question of law; (2) there are substantial grounds for differences of opinion; and (3) an immediate appeal would materially advance the ultimate termination of the litigation. 28 U.S.C.A. S 1292(b); Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75 (1978); Clark-Dietz & Associates-Engineers v. Basic Construction Co., 702 F. 2d 67, 68 (5th Cir. 1983).

Not every interim order which is issued in a case is entitled to interlocutory review. Rather, interlocutory review of non-final orders is limited to those cases in which exceptional circumstances justify a departure from the usual rule of postponing appellate review until after final judgment. Id; In Re Cement Antitrust

Litigation, 673 F. 2d 1020, 1026 (9th Cir. 1982). Interlocutory review simply is not intended to open a floodgate of appeals in ordinary litigation. Dimuccio v. D'Ambra, 779 F. Supp. 1318, 1324 (M.D. Fla. 1991). In determining whether to certify an order for interlocutory appeal, the court should assess the probability that its decision was in error, as well as the extent to which additional time and expense may be saved by the appeal. Id. Moreover, as recognized by the court in Clark-Dietz, questions of facts generally are inappropriate for interlocutory review. 702 F. 2d at 69.

Defendants request that this court amend its Order dated March 29, 1995, to acknowledge that this court's decision involves a controlling question of law where there is substantial ground for difference of opinion and that an immediate appeal, pursuant to 28 U.S.C. § 1292(b), would material advance the ultimate termination of litigation. Defendants argue that the resolution of the controlling question of law in this case, namely, the proper standard to be applied to the Trustee's decision on whether to follow the plan document and tender unallocated shares as directed by the participants, may very well dispose of this case in its entirety.

Defendants also argue that allowing an interlocutory appeal focusing on this issue will allow the court to analyze the evidence in this case under the standard that will be applied by the Eleventh Circuit and avoid the potential for a costly retrial of evidence under a different standard. Lastly, defendants argue that the relevant issue is one where there is no controlling authority and there is substantial grounds for difference of opinion.

Plaintiff objects to defendants' request, arguing that this matter does not involve a controlling question of law where there is no substantial ground for difference of opinion, and that an appeal would prolong the litigation rather than advance the ultimate termination of litigation. Specifically, plaintiff argues that the factual proof at trial to establish the defendants' conduct remains the same regardless of which legal standard is found to be applicable upon appeal; thus, the issue is not "controlling" within the meaning of § 1292. Plaintiff therefore argues that an appeal at this time would prolong litigation rather than materially advance the ultimate termination of this litigation.

After due consideration, despite plaintiff's arguments to the contrary, the court determines that there is substantial ground for difference of opinion in this matter given the absence of definitive controlling authority, and the difference of opinion within the ERISA community. Furthermore, although the factual proof in this case may be the same regardless of the applicable standard, in this court's view, the resolution of this issue may have important implications in the way in which lawyers representing both parties structure their representation.

Finally, this court notes that a determination of this issue at this time, by the Eleventh Circuit, might also establish a precedent helpful to others in the ERISA community faced with similar circumstances.

The court, in short, concludes that this matter does involve a controlling issue of law in which there is substantial ground for difference of opinion, and that resolution of the issue will materially advance the ultimate termination of this litigation.

CONCLUSION

This court accordingly GRANTS defendants' motion for amendment of the court's order on summary judgment motions to permit interlocutory appeal, and AMENDS its Order of March 29, 1995 by inserting the following statement:

> In this court's view, this Order involves a controlling question of law as to which there is substantial ground for difference of opinion; thus, an immediate appeal may materially advance the ultimate termination of this litigation.

SO ORDERED, this8th day of May, 1995.

/s/

HORACE T. WARD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
1:92-CV-1474-HTW

ROBERT REICH, Secretary of the
United States Department of Labor,

Plaintiff

vs.

NATIONSBANK OF GEORGIA, N.A.,
and SOVRAN CAPITAL
MANAGEMENT CORPORATION,

Defendants

ORDER OF COURT

This matter is currently pending before this court on plaintiff's motion for summary judgment and defendants' motion for summary judgment.

FACTS

In July, 1988, Polaroid Corporation ("Polaroid") established an employee stock ownership plan, (hereinafter "ESOP"), within the meaning of the Employee Retirement Income Security Act, (hereinafter "ERISA"), § 407(d)(6), 29 U.S.C.A. § 1107(d)(6). The ESOP purchased Polaroid common stock from Polaroid; it financed that purchase through a cash contribution of approximately $15 million, together with a loan consisting of approximately $285 million. The ESOP then allocated those shares of the common stock purchased with the cash contribution to the individual accounts of ESOP participants ("allocated shares"); ESOP held the shares bought with the remaining funds in an unallocated account as security for the loan ("unallocated shares").

As the ESOP made payments to Polaroid on the loan, it released the shares of Polaroid common stock from the unallocated account into the members' individual accounts. At the time of the tender offers at issue here, over 90% of the ESOP shares were "unallocated."

The ESOP Trustee was Citizens and Southern Trust Company (Georgia) ("Trustee"), later known as NationsBank of Georgia, N.A. Citizens and Southern Investment Advisors ("CSIA"), later known as Sovran Capital Management Corporation, provided investment advice to the ESOP. The Polaroid Employee Stock Equity Plan (the "Plan Document") provided that, in the event of a tender offer, each participant could direct the Trustee in the tendering of any stock allocated to his or her account (commonly referred to as a "pass-through provision"). The Plan Document also provided that a participant's shares could not be tendered unless the participant specifically instructed the Trustee to do so (commonly referred to as an "instruction provision"). Finally, the Plan provided that the Trustee should tender all unallocated shares in the same proportions as the allocated shares (commonly referred to as a "mirror provision").

One week after Polaroid formally created the ESOP, Shamrock Acquisitions III, Inc. ("Shamrock") filed suit in the Delaware Chancery Court to enjoin the ESOP's existence and offered to acquire Polaroid in a negotiated acquisition. Polaroid rejected Shamrock's proposal for a negotiated takeover, and in September, 1988, Shamrock commenced a public tender offer for Polaroid stock ("Initial Tender"). In January, 1989, Shamrock made a tender offer of $45 per share for all of Polaroid's common stock. In February, 1989, Polaroid responded with a competing tender offer of $50 per share for a maximum of 16 million shares of its 71.5 million shares of Polaroid common stock. If more than 16 million shares were tendered, Polaroid would pay the $50 on a pro-rata basis, returning extra shares (or "stub" shares) to each tenderer. Polaroid promised to pay for accepted shares promptly after the offer expired.

On February 23, 1989, the Trustee mailed all ESOP participants a description of the competing tender offers, and advised the participants that they had three options: (1) not to tender at all, (2) to tender to Shamrock, or (3) to tender to Polaroid. In response, some participants directed the Trustee to refrain from

tendering their shares; others instructed the Trustee to tender to Polaroid, while some instructed the Trustee to tender to Shamrock; some participants did not send any instructions with respect to the tendering of their shares.

On March 20, 1989, a Committee of the Trustee met and decided that it was both prudent to tender and prudent not to tender to the Polaroid self-tender. Therefore, the Trustee decided to tender the ESOP shares by following the directions of the plan participants as provided by the terms of the Plan Document. Consequently, on March 23, 1989, the Trustee tendered approximately 5,239,460 shares to Polaroid pursuant to the self-tender, but did not tender to anyone over 3.9 million unallocated shares of Polaroid common stock, and 317,757 allocated shares of Polaroid common stock for which no participant directions were received. In addition, the Trustee did not tender to anyone 31,594 unallocated shares for which it had intentions of later tendering to Shamrock's offer.

As a result of the Trustee's response to the tender offers, the Secretary of the United States Department of Labor, (the "Secretary"), brought the instant action against both the Trustee and its investment advisor, CSIA. The Secretary contends that the Trustee and CSIA failed to adequately investigate, analyze or evaluate the merits of the tender offers with respect to the ESOP, and failed to make the only prudent choice — to tender the ESOP'S stock to Polaroid's self-tender offer for $50 per share. Specifically, the Secretary alleges that 1) the Trustee violated its duties of prudence and loyalty under ERISA §§ 404(a)(1)(A) and 404(a)(1)(B), 2) CSIA violated its duty of prudence under ERISA § 404(a)(1)(B), and 3) that both are liable for each other's breaches under ERISA § 405(a)(2). The defendants are collectively referred to herein as the "Bank."

DISCUSSION

Plaintiff's Motion for Summary Judgment

Defendants' Motion for Summary Judgment

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. Carlin Communication, Inc. v. Southern Bell Tel & Tel. Co., 802 F.2d 1352, 1356 (11th Cir. 1986); Warrior Tombigbee Transporta-

tion Co. v. M/V Nan Fung, 695 F.2d 1294, 1296 (11th Cir. 1983); Fed.R.Civ.P. 56(c). To determine if the moving party meets its burden of proof, the court must view all evidence and inferences to be drawn from it in a light most favorable to the party opposing the motion. Carlin Communication, 802 F.2d at 1356; Sweat v. Miller Brewing Co., 708 F.2d 655, 656 (11th Cir. 1983).

The Supreme Court has addressed the burdens of proof which each party must carry on a motion for summary judgment:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2552-53, (1986) (quotation omitted).

The nonmoving party is required to identify specific facts which demonstrate that there is a genuine issue for trial and may not rest on the allegations or denials in its pleading. Celotex, 106 S. Ct. at 2553. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2510, [91 L.Ed. 2d 202] (1986). In order to survive defendant's motion, however, the nonmoving party need only present evidence from which a jury might return a verdict in his or her favor. If he or she does so, there is a genuine issue of fact that requires a trial. Anderson, 106 S. Ct. at 2514-15.

ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefits plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S. Ct. 2890, 2896, [77 L.Ed. 2d 490] (1983). With respect to

trustees of the assets of an employee benefit plan, Section 403(a) of ERISA, 29 U.S.C. § 1103(a), states in relevant part:

> [All] assets of an employee benefit plan shall be held in trust by one or more trustees....[T]he trustee of a plan shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that ——
>
> (1) the plan expressly provides that the trustee or trustees are subject to proper direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or
>
> (2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers ....

Where the plan designates a "named fiduciary" to make certain decisions regarding the assets of the plan in accordance with Section 403(a)(1), the trustee is commonly referred to as a "directed trustee." While a trustee with exclusive authority is held to a prudent man standard of care in discharging his or her duties with respect to a plan, 29 U.S.C. § 1104, a directed trustee is only responsible for acting upon the "directions" of a named fiduciary which are made in accordance with the terms of the plan and are not contrary to ERISA. 29 U.S.C. § 1103(a)(1).

There is no dispute that the Bank was a directed trustee with respect to the tender of allocated shares under the Plan Document, and the participants were the "named fiduciaries" with respect to the shares allocated to their individual accounts. The Bank, therefore, was only required to follow each participant's direction as to whether or not to tender the shares allocated to their individual account. Moreover, there are no allegations that the Bank acted improperly as a "directed trustee" with respect to the allocated shares.

The dispute is what standard of care did the Bank owe the participants with respect to the tender of unallocated shares, and allocated shares in which participants failed to return proxies ("nonvoted shares"). In Count I of the complaint, the Secretary

contends that the Bank should have exercised independent judgment in response to the tender offers with respect to the unallocated shares and nonvoted shares, and that the Bank failed to do so in violation of ERISA §§ 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B). More specifically, the Secretary alleges that the Bank failed to conduct an adequate investigation of the merits of the tender offers, and thus did not choose a prudent course of action under the circumstances. Both parties now move for summary judgment on Count I.

The Bank has moved for summary judgment on the grounds that it was a "directed trustee" of all the shares at issue due to the pass-through and mirror provisions in the Plan Document. As a "directed trustee," the Bank claims that the fiduciary obligations for the tender of shares were met when the Bank followed the proper directions of the participants made in accordance with the Plan Document. The Bank also notes that the Secretary's complaint does not allege that the Bank breached its duty under the standard of care for a "directed trustee."

As an initial matter, the Secretary argues that this court has already decided that the Bank was required to exercise independent judgment in the performance of its fiduciary duties, when the court struck down the indemnification agreement in the Plan Document. See Martin v. NationsBank, [1993 U.S. Dist. LEXIS 6322,] 93-CV-1474-HTW, 1993 WL 345606 (N.D.Ga. April 6, 1993). The indemnification agreement gave the trustee absolute indemnification for any action taken in compliance with the written direction of the participants. The Secretary, therefore, argues that the court need not address the Bank's contentions that its actions were subject to the "directed trustee" standard rather than the "prudent man" standard of care required by ERISA § 404(a). This court disagrees.

In its order dated April 6, 1993, this court merely held that a provision that promises a trustee full indemnification from any actions taken upon the written direction of the participants was in violation of a trustee's fiduciary obligations under ERISA, and thus facially invalid. While the court concluded that such an indemnification provision creates a financial incentive for a trustee not to exercise independent judgment, this court did not address the issue of whether the exercise of independent judgment was

the standard of care required of the Bank under this particular ESOP.

The Secretary next argues that accepting the Bank's position that it acted as a lawful "directed trustee" in applying participant directions concerning allocated shares proportionally to unallocated shares, goes against the accountability principles underlying ERISA. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), defines a fiduciary as a person "who exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets..." ERISA § 409(a) imposes personal liability on any fiduciary who breaches one or more of the fiduciary responsibilities imposed by the statute. 29 U.S.C. § 1109(a). ERISA § 404(a) provides that plan fiduciaries are to be held to a prudent man standard of care in performing duties of managing and controlling plan assets. 29 U.S.C. § 1104(a). Thus, the Secretary argues that ERISA plainly contemplates that plan assets be managed and controlled by readily identifiable persons who are subject to strict standards of fiduciary responsibility that are enforceable through ERISA's comprehensive enforcement mechanism. See ERISA § 502, 29 U.S.C. § 1132.

The Secretary maintains that participants cannot become "named fiduciaries" of shares not allocated to their own individual accounts pursuant to ERISA § 403(a)(1), because they cannot be held accountable for decisions regarding such shares. Unlike allocated shares, which are identified and assigned to individuals' accounts, unallocated shares are instead part of a general pool of trust assets designed to inure to the benefit of future plan participants. Therefore, the Secretary argues that while it is proper for plan participants to make decisions which will affect shares allocated to their accounts, it is not proper for plan participants to make decisions that will affect the value of shares inuring to the benefit of future participants. To allow otherwise, would eviscerate ERISA's underlying policy that readily ascertainable fiduciaries be financially responsible for mismanagement of plan assets.

The Bank argues that the Secretary is not applying its accountability reasoning equally to allocated and unallocated shares. The Bank maintains that although participants that are "named fiduciaries" of stock allocated to their individual account may be

considered readily identifiable persons, they also cannot be held to the strict standards of fiduciary responsibility with respect to the directions given on responding to tender offers. In other words, participants cannot be sued as a result of their investment decisions. Yet, the Secretary deems it proper for these participants to make decisions which will affect shares allocated to their accounts. The Bank questions why accountability is necessary for unallocated shares but not for allocated shares.

After due consideration, this court concludes that the Secretary has made a plausible argument that one of the underlying principles of ERISA is that readily ascertainable fiduciaries must be held accountable to plan participants for acting prudently and with the exclusive purpose of providing benefits to plan participants and beneficiaries. The court agrees with the Bank, however, that the Secretary has failed to adequately explain why accountability is necessary for unallocated shares but not for allocated shares. It would appear that, if this court were to accept the Secretary's accountability reasoning, participants should not be allowed to make tendering decisions regarding either allocated or unallocated shares. Nonetheless, it is already established that under ERISA's statutory scheme, participants are allowed to make decisions regarding shares allocated to their individual accounts. Thus, this court is not convinced that accountability alone is adequate grounds to prevent participants from making tendering decisions regarding unallocated shares.

Nonetheless, this court is concerned about a provision that relieves a trustee from certain responsibilities as a fiduciary of the general pool of trust assets. Especially in a case such as this one, where 90% of the shares are not allocated to an individual account, and remain in the general pool. Any tendering decision regarding such an overwhelming majority of shares will have a strong impact on the benefits of the plan in the future.

At least one court, in dicta, concluded that it is inappropriate for present participants of a Plan to make decisions for the benefit of participants in the future. Danaher Corp. v. Chicago Pneumatic Tool Co., 635 F. Supp. 246, 250 (S.D.N.Y. 1986). In Danaher, the court opined that there was an inherent conflict of interest in allowing a plan's decision to tender its shares in response to a takeover offer, to be governed solely by the wishes of the present participants. According to the Danaher court, the

conflict problem arises from the fact that "present participants have no interest in voting for what will benefit participants in the future if such a vote results in those benefits going to persons other than themselves." Id.

The Bank argues that Danaher has no bearing on the present case, as it is dicta, and is an analysis of pass-through provisions based on general trust principles rather than ERISA § 403(a). In this court's view, although the opinion in Danaher is dicta, the court made a well-reasoned analysis. Furthermore, this court has previously stated that the standards which now govern ERISA fiduciaries derive from the common law of trusts. Although ERISA § 403(a) expressly provides that a trustee is subject to the direction of a "named fiduciary," this can only occur when it is not contrary to ERISA. In this court's view, allowing present participants, who have an immediate conflict of interest, to act as "named fiduciaries" of unallocated shares is contrary to ERISA. There is simply no way to ensure that present participants will make tender decisions that are in the best interests of all participants who will benefit from the plan in the future, without requiring a trustee to exercise independent judgment.

Upon consideration, this court further concludes that Internal Revenue Code, 26 U.S.C. § 409(e), does not require that this court sanction mirror voting provisions in all ESOPs. Section 409(e) requires that voting rights be passed through to individual employees on all allocated shares in a publicly held corporation's ESOP. Section 409(e)(5) provides that certain types of ESOPs can authorize the trustee to vote all plan shares in proportion to the voting instructions received from plan participants on a one person, one vote basis. The Bank argues that Section 409(e)(5)'s reference to "all plan shares," would naturally include unallocated as well as allocated shares, and thus Congress recognizes and approves mirror voting provisions.

This court, however, agrees with the Secretary that since Section 409(e)(5) does not delineate between allocated and unallocated shares, it can equally be inferred that Congress intended this section to apply only to the allocated shares specifically referred to earlier in Sections 409(e)(2) and (3). Even if this court were to agree with the Bank's interpretation of Section 409(e)(5), at the most, it would appear that Congress has only recognized and approved mirror voting provisions in certain cir-

cumstances. These circumstances are when an ESOP: 1) falls under Section 409(e)(3), where the employer does not have a registration-type class of securities, and 2) provides for apportioning its votes on a one person, one vote basis. The Polaroid ESOP meets neither of these criteria, and thus, Section 409(e)(5) is inapplicable.

In Count I of the complaint, the Secretary also alleges that the Bank breached its fiduciary duties with respect to the allocated shares for which no instructions were received (the "nonvoted shares"). The Bank moves for summary judgment on the grounds that Section 403(a)(1) allows a "directed trustee" to infer from participants' silence, an instruction not to tender shares allocated to such participants' accounts. The Secretary argues that such an inference ignores the plain language of Section 403(a)(1), which expressly states that a trustee's exclusive authority to manage and control plan assets can be subject only to a "direction" from a named fiduciary. 29 U.S.C. § 1103(a)(1). According to the Secretary, the statute simply does not apply where there is a "failure to direct" or a "non-direction." Thus, undirected allocated shares do not fall within Section 403(a)(1).

Under ERISA's strict fiduciary scheme, investment decisions must be made prudently and in the interest of plan participants by a well-informed trustee or named fiduciary. In this court's view, the only way to ensure that participants, as named fiduciaries, are well-informed and are actually directing trustees on investment decisions, is to interpret Section 403(a)(1) as requiring affirmative direction. Without an affirmative act, it is impossible to determine if a participant's silence is actually a direction, or a failure to direct due to unforeseen circumstances. Accordingly, when a trustee receives no affirmative direction regarding allocated shares, the trustee must take exclusive responsibility for decisions regarding these shares.

Finally, both sides have moved for summary judgment on the issue of whether the Bank violated ERISA by failing to act solely in the interest of the plan participants, and by failing to act with the care and skill required by ERISA. This court has carefully reviewed the sequence of events, and the evidence submitted by both parties. Both parties have offered a different perspective regarding the consensus of brokerage reports regarding the Polaroid stock; statements in the financial press at the time;

the statements and actions of Polaroid and Shamrock, the parties making the tender offers; and the Delaware Chancery Court's decision regarding the fundamental fairness of the ESOP. Given the differing expert opinions, the different inferences that can be made from the various factors involved at the time of the tender offers at issue here, and the voluminous arguments each side makes in support of their respective positions, in this court's view, whether the Bank did or did not act prudently, is a material question of fact to be resolved at trial. Accordingly, both motions for summary judgment are DENIED.

CONCLUSION

After due consideration, this court DENIES plaintiff's motion for summary judgment and DENIES defendants' motion for summary judgment.

SO ORDERED, this 29th day of March, 1995.

/s/

HORACE T. WARD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E

The following is a list of all wholly owned subsidiaries of NationsBank, N.A.:

American Security (Louisiana) Ltd.
Ashborn A Corp.
Atico Financial Corporation dba Cavalier Properties
Baltic M Corp.
Bank IV Securities, Inc.
Bank South Home Equity, Inc.
BNB Auto, Inc.
Boatmen's Foreign Investment Corporation
CC Plaza M Corp.
CFB Holding Corporation
Chase Eagle, Inc.
Chase Federal Housing Corporation
Chase/Scarborough Group, Inc.
Chesapeake M Corp.
Courtcom M Corp.
CSI Holdings, Inc.
Devon A Corp.
Down Under Finance Corporation
Dulsney Valley Corporation
Elwin Company, Inc.
EXHO Properties, Inc.
Federal Properties I, Inc.
Finance Investment Company
First Development Corporation
First Financial Real Estate Development, Inc.
First Land Sales, Inc.
First Revitalization Corp.
Fountain Square Corporation of Maryland
Gatwick, Inc.
Guardian Property, Inc.
Harbilan Corporation
Harper Farm M Corp.
HICO Park M Corp.

Madison Park A Corp.
Main Place Holdings Corporation
Mar A Lowe Corp.
Marco Properties, Inc.
Maryland National Community Development Corporation
Maryland Nationalease Corporation
Maywell Mark Corp.
Melwood M Corp.
Metropo M Corp.
Metropolitan Commercial Properties Corporation I
Metropolitan Commercial Properties Corporation VIII
Metropolitan Commercial Properties Corporation X
Midwest Realty & Management, Inc.
M&M Realty, Inc.
MNC Consumer Discount Company
MNC Investment Bank, Ltd.
Motift, Inc.
Multi-State Properties, Inc.
MYM Holdings Corporation
NationsBanc Advisors, Inc.
NationsBanc Auto Funding Corporation
NationsBanc Charlotte Center, Inc.
NationsBanc Commercial Corporation
NationsBanc Dealer Leasing, Inc.
NationsBanc Equity Mortgage Corporation
NationsBanc Financial Products, Inc.
NationsBanc Insurance Services, Inc.
NationsBanc Investments, Inc.
NationsBanc Lease Investments, Inc.
NationsBanc Leasing Corporation
NationsBanc Montgomery Funding Corp.
NationsBanc SBIC Corporation
NationsBanc Carolinas Merchant Services, Inc.
NationsBanc Florida Merchant Services, Inc.
NationsBanc Venture Corporation

NationsBank CLO Funding Corp.
NationsBank Europe Limited
NationsBank International
NationsBank Overseas Corporation
Nations-CRT Options, Inc.
NationsLink Funding Corporation
NB Partner Corp.
NB Technology Partner, Inc.
NCNB Community Development Corporation (22)
OA Management, Inc.
The Ocmulgee Corporation
Palisades A Corp.
Pan American Mortgage Corp.
Pratt Management Company
Quality A Corp.
Quatro I, Inc.
Ritchio Court M Corporation
River City Capital Management, Inc.
Rive Gauche A Corp.
Rockwell Resources, Inc.
Rooms-Springfield, Inc.
SCRC Carroltowne, Inc.
SCRC Process Service Corp.
Securitization Funding Corporation
Seabrook Operations, Inc.
Seaview of Seabrook, Inc.
Service-Wright Corporation
Seventeenth Commerce Properties Corporation
SOP M Corp.
South Charles Realty Corp.
South Point Shopping Center, Inc.
Spotted Horse Holdings, Inc.
St. Louis Investment Properties, Inc.
Sully A Corp.
Sunset Hill Corporation
Sweltzer M Corp.
Sykesville M Corp.
Tower Commercial Realty, Inc.

Townsite Plaza Development, Inc.
TradeStreet Investment Associates, Inc.
Union Realty and Securities Company
Vernon M Corp.
WAC One, Inc.
Washington View, Inc.
Wellington Land Co., Inc.
Wickliffe A Corp.
Woods M Corp.